Supreme Court, U.S.
FILED

001352 FEB 13 2001

No. 01____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

William Kennedy

Petitioner,

v.

United States of America,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

Petition For Writ of Certiorari

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February 13, 2001

Balmar Legal Publishing Services, Washington, DC 202-682-9800

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that once a habeas corpus defendant shows that the prosecution improperly obtained confidential and privileged defense strategy information, the defendant must still prove actual and substantial prejudice before obtaining an evidentiary hearing and any relief under the Sixth Amendment or the Fifth Amendment to the United States Constitution.

2. Whether the Court of Appeals erred in ruling that a prosecutor is not prohibited under the Sixth Amendment from improperly extracting confidential information from a former law clerk of petitioner's legal defense lawyers, and committing a knowing intrusion into attorney-client privilege.

3. Whether the Court of Appeals erred in ruling that, where a prosecutor intentionally induced a former defense law clerk to divulge attorney-client privileged information, and then lied to defendant's counsel about his contact with the law clerk, this was not sufficiently "outrageous" misconduct to implicate the Fifth Amendment.

4. Where the government commits a deliberate pre-indictment intrusion into the defense's legal camp which produces confidential defense strategy information, whether the Sixth Amendment creates a presumption that the continuum of the intrusion post-indictment also yielded prejudicial disclosures.

5. Whether the Court of Appeals erred in refusing to permit a motion to supplement the appeal record with an affidavit that contained newly discovered proof that the pre- and post-indictment prosecutorial intrusion into attorney-client privileged matters could be linked to prejudicial evidence produced at trial.

PARTIES TO THE PROCEEDINGS

The parties in the proceedings below are those listed in the caption. The petitioner has no parent or subsidiary corporation.

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OPINIONS BELOW

The Court of Appeals' published decision of September 20, 2000 on petitioner's habeas corpus petition, is reported at 225 F.3d 1187 (10th Cir. 2000). Appendix A. The unpublished denial, on November 17, 2000, of the petition for rehearing and suggestion for rehearing *en banc* appears in Appendix B. The trial court's denial of the habeas corpus petition is reported at 29 F.Supp. 2d 662 (D. Colo. 1998). The court of appeal's affirmance of the conviction on direct appeal is reported at 64 F.3d 1465 (1995).

JURISDICTION

The decision and order of the Court of Appeals was entered on September 20, 2000. Appendix A. A timely petition for re-hearing with suggestion for rehearing *en banc* was filed, and denied on November 17, 2000. Appendix B. The jurisdiction of this Court is conferred under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part:

> No person shall ... be deprived of life, liberty, or property, without due process of law ...

The Sixth Amendment to the U. S. Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defense.

Section 28 U.S.C. § 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of

> the United States ... or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was ... otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

STATEMENT OF THE CASE

In 1993, following a jury trial, petitioner William Kennedy ("Kennedy") was convicted of mail fraud, money laundering, and racketeering (18 U.S.C. §§ 2 & 1341, 1956(a)(1)(A)(i) & 2, and 1962(c) and 1963) in connection with activities as President of his precious metals company, Western Monetary Consultants ("WMC"). The prosecution arose because WMC had failed to fill some of its paid customer orders for metals as of the time of its filing for Chapter 11 bankruptcy in March of 1988, the terminus of the indictment period. The numerous WMC employees who were also charged criminally, and who were tried with Kennedy, were all acquitted. Kennedy was also indicted by the same grand jury for offenses relating to public relations efforts to support the Persian Gulf War ("Kuwait" case), but those charges were dismissed by the government. Kennedy

was sentenced to twenty years in prison in the WMC-related case.[1]

In 1989 and 1990, during the first grand jury investigation of WMC and Kennedy, Kennedy was represented by the law firm of Brown & McDonnell ("Brown firm") and criminal defense attorney, Steve Mayo. A law school graduate and law clerk employed at the Brown firm, Keith Danley (working closely together with Brown attorney, John Romaker, and attorney Mayo), coordinated both the criminal defense of Kennedy and the civil defense of suits arising out of the WMC transactions. Danley also interviewed witnesses, sat in on strategy sessions with the defense attorneys, had extensive consultations with Kennedy, including a videotaped mock cross-examination of Kennedy by Danley and attorney Mayo regarding his WMC criminal exposure, and did legal research on Kennedy's WMC problems. During the grand jury investigation, Danley was identified to the federal prosecutor ("AUSA") as a key member of Kennedy's criminal defense team.

In October of 1990, both Danley and Romaker left the employ of the Brown firm and began working directly for Kennedy. John Romaker opened his own law office and functioned as Kennedy's "outside counsel." Danley, whom Kennedy believed to have passed the bar exam, was to be his personal "in house counsel." Danley's role in his dealings with Kennedy after October of 1990 is disputed. The

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[1] The extraordinary length of his sentence was due to application of the money laundering sentence guidelines, rather than relying on the mail fraud sentence guidelines which would have yielded a maximum of fifty-seven months. The gist of the money laundering counts was that WMC merely deposited money from its investors in the WMC accounts. *United States v. Kennedy*, 64 F.3d 1465, 1477 (10th Cir. 1995) ("*Kennedy* I"). Currently three circuits are declining to apply the money laundering guidelines to such "receipt and deposit" cases, limiting them instead to the "heartland" of offenses intended by Congress and the U.S. Sentencing Commission, such as drug trafficking. *See United States v. Smith*, 186 F.3d 290 (3rd Cir. 1999).

government contends that Danley did not pass his first bar exam, and was merely a business consultant for Kennedy in the time frame subsequent to his leaving the Brown firm.

It is undisputed, however, that from October 1990 until June of 1991, Danley and Romaker worked directly for Kennedy. Some of their duties included legal matters relating to the "Kuwait" public relations effort by Kennedy and others. However, by December of 1990 the AUSA had commenced a second grand jury relating to Mr. Kennedy's activities both as to WMC and also regarding his new "Kuwait" venture, and attorney Romaker and Mr. Danley worked with criminal defense attorneys in assisting Kennedy regarding his possible criminal exposure. Romaker considered Danley, at a minimum, a necessary legal agent for the transmission of information and advice flowing between Kennedy and his several attorneys during that time.[2]

In May of 1991, Danley passed the bar exam and in June, 1991, both he and Romaker terminated their relationship with Kennedy. One month later, a federal agent working for the AUSA attempted contact with Danley through a telephone conversation with Danley's wife. By September, 1991, Danley had begun substantial business dealings in Argentina, and was spending much time out of the country. Danley was asked by the AUSA and the federal agents to participate in a series of interviews regarding Kennedy, WMC and the "Kuwait" project.

The interviews with the AUSA started in September, 1991, and continued through July 2, 1992, the date the grand jury issued indictments against Kennedy in both the WMC case and the "Kuwait" matter. In the interviews, Danley was

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[2] In addition to his criminal defense attorney, and Romaker and Danley, Kennedy was assisted by civil defense attorneys, a personal attorney for Kennedy's Chapter 7 bankruptcy, and a bankruptcy attorney in the WMC Chapter 11 proceedings which resulted in a court-approved plan for repayment of creditors.

asked to, and did, produce all his records relating to Kennedy and WMC. These records included privileged documents. However, interviews between Danley and the AUSA also continued *post-indictment*, including at least one occasion where the Government flew Danley to Denver from Argentina to review boxes of records, and also to locate some notes of Danley's that had been given to the AUSA, but then later turned up missing.

From the beginning, the AUSA had actual knowledge of Danley's role as a former member of the Kennedy legal defense team through his prior employment with the Brown law firm. During the first interview with Danley in Denver, the AUSA contacted attorney Romaker by telephone to discuss aspects of the Kennedy case. Attorney Romaker warned the AUSA that everything that Danley knew about WMC and Kennedy's activities with WMC was derived from privileged attorney-client sources, and that the government could not discuss anything regarding WMC with Danley.

Rather that heeding Romaker's warning, or bringing this matter before a magistrate to ensure that Kennedy's attorney-client privilege would not be violated, the AUSA conducted numerous interviews in which he questioned Danley on WMC related issues, many of which involved inculpatory disclosures of confidential defense information regarding Kennedy.

During the prosecution of the WMC case, Kennedy was unaware of Danley's disclosures of privileged information. Meanwhile, the Kuwait case was moving on a slower, parallel litigation track in the U.S. District Court. However, when Danley's involvement as a potential witness in the companion Kuwait case surfaced, Kennedy's court-appointed counsel (who represented Kennedy in both cases) confronted the AUSA, who was prosecuting both the WMC and Kuwait cases. The AUSA assured Kennedy's counsel, in a false and misleading statement, that Danley was in no way involved in the WMC prosecution. Relying on these assurances, defense trial counsel never pursued any pretrial motions in the WMC

case relating to attorney-client intrusions regarding the government interviews with Danley.

Following Kennedy's conviction in the WMC trial in the fall of 1993 before U.S. District Judge Louis Babcock, and after his sentencing in January 1994, a series of pretrial motions in the pending Kuwait case were held before U.S. District Judge Matsch. It was only following Kennedy's conviction in the WMC case, and culminating in the Kuwait trial in 1995 against co-defendant and former U.S. Ambassador Sam Zakhem, a case in which Danley testified as a government witness, that the troublesome scope of the government's interviews with Danley started surfacing. Zakhem was acquitted, and the Kuwait-related charges against Kennedy were dismissed.

Following an unsuccessful direct appeal in *Kennedy* I, Petitioner filed his first motion for new trial under § 28 U.S.C. § 2255, alleging, *inter alia*, deliberate government intrusion into attorney-client privileged defense information in violation of the Fifth and Sixth Amendments.

Neither the District Court (nor the Court of Appeals for that matter) noted any deficiency in Kennedy's allegations or proof that the actions of the government in interviewing Danley in fact constituted a deliberate invasion of attorney-client privilege or attorney-work product privilege.[3] Further, the fact that the source of Danley's privileged information about Kennedy and WMC arose from his work as a law clerk for the defense lawyers, rather than as an attorney, was not relied on by the trial court in denying the petition. In any event, it should have no effect on the application of the attorney-client privilege or attorney-work product privilege.[4]

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[3] The application of the attorney-work product privilege to criminal cases is firmly established. *United States v. Nobles*, 422 U.S. 225 (1975).

[4] In criminal cases, unconstitutional government intrusion into an attorney-client relationship can occur when government agents improperly interview an attorney's assistant. *See United States v. Valencia*, 541 F.2d

Rather, in denying Kennedy's post-conviction petition relating to the attorney-client intrusion issue, the trial court focused entirely on Kennedy's alleged failure of proof regarding "prejudice." *United States v. Kennedy*, 29 F.Supp. 2d 662, 685 (D. Colo. 1998) ("*Kennedy* II").

Kennedy appealed the trial court's refusal to grant him an evidentiary hearing on his § 2255 motion. Proximate to the time of that appeal, Kennedy's counsel, having located Danley where he was residing in Argentina, learned that he was planning a trip back to the United States. When Danley returned to the United States on personal business, Kennedy's attorneys served Danley with Kennedy's civil suit for damages that had been filed in state court in California. The civil action alleged, *inter alia*, breach of fiduciary duty by Danley regarding his collaboration with the AUSA who prosecuted Kennedy. Danley defended the case vigorously, first removing the action to federal court, then filing motions to dismiss based on lack of jurisdiction, and objecting to being deposed. Appendix C.

However, following oral argument in the Tenth Circuit Court of Appeals in the subject case, and shortly before a hearing scheduled in California federal court in the civil case, Danley expressed an interest to Kennedy's attorney in disclosing the truth about his contacts with the government prosecutor. Danley flew from his home in Argentina to Washington, D.C. where he was debriefed by Kennedy's attorneys. The result was a detailed, sworn declaration by Danley, Appendix D herewith, outlining that:

- he was induced to cooperate by the AUSA through informal promises of immunity from prosecution;

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618 (6th Cir. 1976) (involving an attorney's secretary); *United States v. Kelly*, 569 F.2d 929, 938 (5th Cir. 1978) (in a criminal context, attorney-client privilege can extend to a "member of a bar of a court, *or his subordinate* ...") (emphasis added); *United States v. Noriega*, 917 F.2d 1543, 1551 (11th Cir. 1990), *cert. denied sub nom, Cable News Network, Inc. v. Noriega*, 398 U.S. 1976.

- he was manipulated by the AUSA into disclosing confidential information in violation of Kennedy's attorney-client privilege;

- the AUSA was fully aware that he was entering forbidden territory discussion WMC matters with Danley, even confiding the fear that it might "poison" the WMC case;

- information disclosed to the AUSA, both pre-indictment and post-indictment, included defense information about potential prosecution and defense witnesses, the result of defense legal analysis, and new disclosure of facts regarding Kennedy's commodities "speculation" that later became a centerpiece of the government's theory of the case, as noted by the Court of Appeals in the subject appeal. *United States v. Kennedy*, 225 F.3d 1187, 1190 (10th Cir. 2000) ("*Kennedy* III"). *See* Appendix A. Danley even admitted assisting the AUSA with a chart being prepared for the WMC trial, and that he disclosed to the AUSA details of the confidential videotape session with Kennedy where Danley and attorney Mayo conducted a mock cross-examination of Kennedy regarding his WMC criminal liability.

Kennedy then filed with the Court of Appeals, a motion to supplement the appeal record with Danley's newly obtained affidavit. The motion was opposed by the government, but it did not present counter-affidavits.

In its decision, the Court of Appeals first addressed the threshold matter of the motion to supplement. In denying the motion , and thus disregarding the contents of the Danley declaration on the merits, the Court adopted the test outlined in *Ross v. Kemp*, 785 F.2d 1467 (11th Cir. 1986). The Court concluded that the Danley affidavit did not satisfy the first factor of the *Ross* test: i.e., that it failed to "establish beyond any doubt the proper resolution of the pending issue."

In ruling on petitioner's Fifth and Sixth Amendment claims, the Court of Appeals upheld the trial court's denial of petitioner's request for an evidentiary hearing into the alleged misconduct of the prosecutor relating to intrusion into the attorney-client privilege.[5]

On the Sixth Amendment claim, the Court reasoned that the pre-indictment attorney-client intrusions by the government did not implicate the Sixth Amendment because it had not yet attached. As to the post-indictment attorney-client intrusions, the Court held that petitioner could not point to any "material" disclosures during that time frame that would have prejudiced the defense, and in any event, the Sixth Amendment could not be violated by an attorney-client intrusion that took place *after* the attorney or his agent had

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[5] While the Court of Appeals did not articulate the standard a post-conviction defendant must satisfy before being granted an evidentiary hearing relating to prosecutorial misconduct, it is apparent that the Tenth Circuit has substantially departed from prevailing law. In *United States v. Voigt*, 89 F.3d 1050, 1067 (3rd Cir. 1996), *cert. denied*, 519 U.S. 1047 (adopted and relied upon by the Court of Appeals in this case) the Court required only the showing of a "colorable claim" of prosecutor misconduct in an attorney-client privilege intrusion case. *Id.* at 1062-1063, 1067. *See also*, *United States v. Kelly*, 790 F.2d 130, 139-140 (D.C. Cir. 1986) (evidentiary hearings in attorney-client intrusion cases are appropriate where the defendant files a motion with facially adequate allegations, which the government inexplicably fails to counter with its own affidavits); *United States v. DiDomenico*, 78 F.3d 294, 300-301 (7th Cir. 1996)(when a defendant supports a post-conviction habeas corpus motion with affidavits asserting an invasion of attorney-client privilege, the Government prosecutor must "counter the motion with his own affidavits ..." or face a full-blown evidentiary hearing); *Bracy v. Gramley*, 520 U.S. 899, 909 (1997)("good cause" for habeas corpus discovery existed merely on proof that the sentencing judge was later convicted in bribery in other cases, and that the defendant asserted a plausible theory that the judge's handling of his case may have resulted from a desire to "deflect any suspicion" raised by two other "rigged" cases that preceded and followed defendant's case. Though such assertions by the defendant were noted to be "only a theory at this point," *Id.* at 908, the Court ordered factual development through discovery).

terminated the professional relationship with the client (here, Kennedy).

As to the Fifth Amendment claim, the Court concluded that Kennedy had failed to prove "actual and substantial prejudice" flowing from the confidential defense information provided by Danley to the AUSA. The Court also decided that that facts here, showing a deliberate attempt by the AUSA to penetrate attorney-client protected defense information, coupled with the AUSA's deceptive and misleading denial to Kennedy's defense counsel that Danley was in any way connected with the WMC case, were not "sufficiently outrageous to support granting a new trial or dismissing the indictment." *Kennedy* III, at 225 F.2d 1197.

Petitioner filed a timely petition for rehearing and suggestion for rehearing *en banc*, which was denied on November 17, 2000. Appendix B.

REASONS FOR GRANTING THE WRIT

This case presents the troubling scenario of a federal prosecutor who collaborated with a former member of a defendant's legal team, and knowingly breached the attorney-client privilege and attorney-work product privilege of the client/defendant in order to build a criminal case against him.

This Court should grant certiorari in order to resolve the myriad of conflicts that exist among various circuits regarding the burden, and the standards of proof and persuasion in attorney-client intrusion cases where they arise in a habeas corpus context. In both Sixth Amendment right to counsel claims, as well as Fifth Amendment due process claims, the courts of appeal have divided on whether the defendant has the burden of proving "actual and substantial prejudice" before ever receiving the benefit of an evidentiary hearing, with its accompanying truth-seeking function. Two members of this Court, as well as a state supreme court have previously noted the need to resolve this conflict under the Sixth Amendment.

This Court should also grant certiorari in order to review the decisions of the Tenth Circuit in the subject appeal, and the Ninth and Seventh Circuits, which have adopted the rule that the government may, with impunity, violate the attorney-client privilege of criminal defendants without violating the Sixth Amendment as long as it targets only *former* attorneys or their *former* law clerks to be informants of confidential defense information. No Supreme Court decision has ever sanctioned such an interpretation of the Sixth Amendment. Further, such a ruling is at odds both with the role of the attorney-client privilege in the administration of justice, and this Court's recent upholding of the vitality of that privilege in *Swindler & Berlin v. United States*, 524 U.S. 399, 403-04 (1999).

This petition also presents the important issue of whether, where pre-indictment disclosures of defense strategy information are deliberately and wrongfully obtained by the government, there should be a presumption of prejudice that attaches to the post-indictment continuum of attorney-client intrusions.

There is also a need for this Court to review the "outrageousness" standard applicable under the Fifth Amendment, where the petitioner asserts a colorable claim that the prosecutor intentionally, and wrongfully invaded defense strategy information and then made misleading assurances to petitioner's counsel to the effect that such invasion had not taken place. There is insufficient Fifth Amendment guidance among the Courts of Appeal where the prosecutorial misconduct, as here, lacks any legitimate law enforcement justification, and does not occur in a drug offense context where the use of informants is particularly necessary.

Lastly, especially in light of the harsh standards that discourage consideration of "second or successive" petitions for habeas corpus, this Court should review, and reverse the Court of Appeal's adoption of a Olympian test that must be met before evidence of prejudicial prosecutorial wrongdoing

will be accepted as a supplement to the appeal record where it was newly discovered during the appeal on the first habeas petition.

This Court should grant certiorari and reverse the Court of Appeals' denial of petitioner's motion to supplement the appeal record with a newly acquired affidavit, or in the alternative, reverse the Court of Appeals refusal to remand to the trial court for a reconsideration of its ruling on petitioner's first habeas petition in light of that affidavit. Or, alternatively, this Court should grant certiorari and reverse the Court of Appeal's ruling on the Sixth Amendment, or on the Fifth Amendment, and remand this case to the trial court for an evidentiary hearing.

I. THERE IS A CONFLICT IN THE CIRCUITS AS TO THE APPROPRIATE BURDEN OF PROVING PREJUDICE WHERE A GOVERNMENT PROSECUTOR INVADES ATTORNEY-CLIENT PRIVILEGE OF THE DEFENDANT.

In this case, the Court of Appeals for the Tenth Circuit adopted a standard that required petitioner to prove that privileged information concerning the case, obtained during post-indictment meetings between the law clerk and the government prosecutor, were "material."[6] *Kennedy* III, 225 F.3d at 1194, n.4.

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[6] In the Tenth Circuit, the Court of Appeals has analogized the test of "materiality" under the rule of *Brady v. Maryland*, 373 U.S. 83 (1963) to the test of "prejudice" under the procedural default rules applicable to habeas corpus. *United States v. Hernandez*, 94 F.3d 606, 609-610 (10th Cir. 1996); *Kennedy* II, 29 F.Supp.2d at 680. It is clear that the Court of Appeals has also used "materiality" and "prejudice" interchangeably in this attorney-client intrusion context, because its opinion in this case is based on its ultimate conclusion that "Mr. Kennedy has failed to show how his defense was prejudiced by the Government's alleged possession of the information obtained through Mr. Danley." *Kennedy* III, 225 F.3d at 1197.

The Court found that petitioner's inability to characterize the materiality of notes given by Danley to the prosecutor post-indictment, which were later lost by the government, was fatal to his Sixth Amendment claim and his request for an evidentiary hearing.

However, the Tenth Circuit failed to comment on the quality of Kennedy's proof of prejudice regarding information disclosed during pre-indictment interviews between the law clerk and the Government prosecutor in its evaluation of Kennedy's Sixth Amendment argument. *Kennedy* III, 225 F.3d at 1194.

In fact, petitioner asserted proof of privileged defense strategy information which was disclosed pre-indictment to the government. These examples included disclosure of defense attorney's investigation of potential defense and prosecution witnesses, revelation of the very commodities speculation issue later used by the government at trial (*Kennedy* III, 225 F.3d at 1190), a copy of a check used to discredit a key defense witness at trial, and delivery to the prosecutor of a privileged attorney-client letter generated during the grand jury proceedings in the case.

The Tenth Circuit Court of Appeals did note these allegations of prejudice in its discussion of petitioner's Fifth Amendment argument. *Kennedy* III, 225 F.3d at 1196, n. 6. However, the Court failed to explain why it found such proof to be not sufficiently prejudicial. Instead, the Court of Appeals stated:

> Rather than expanding this Opinion to include an in-depth analysis of every piece of information Mr. Kennedy asserts the prosecution obtained through Mr. Danley, we assure the parties we have examined the record and conclude Mr. Kennedy has shown no prejudice resulting from the alleged intrusions into his relationship with Mr. Danley ... thus, we need not address his argument concerning the government's failure to come forward with an

> explanation for how it received the information Mr. Kennedy claims came from his attorney.

Id. The Tenth Circuit thus requires a habeas corpus defendant to prove prejudice as a condition to receiving an evidentiary hearing, where the very purpose of such a hearing is to explore the existence of prejudice.

A. SIXTH AMENDMENT CASES

1. A Split Within The Circuits Has Been Recognized By Members Of This Court.

In *Cutillo v. Cinelli*, 485 U.S. 1037 (1988), *cert. denied* (White, J., dissenting), Justice White, joined by Chief Justice Rehnquist and Justice O'Connor, noted conflicting approaches within the Circuits, warranting a grant of certiorari, in cases where the prosecution has illegally obtained privileged defense strategy information, but where there is a dispute as to the extent of "prejudice" to the defense. The dissent noted:

> In *Weatherford v. Bursey*, 429 U.S. 545, 558, 97 S.Ct. 837, 845, 51 L.Ed.2d 30 (1977), we held that establishing a violation of a defendant's Sixth Amendment right to counsel requires a showing of "at least a realistic possibility" of prejudice to the defendant or benefit to the prosecution. See also *United States v. Morrison*, 449 U.S. 361, 365-366, 101 S.Ct. 665, 668-669, 66 L.Ed.2d 564 (1981). This case presents the issue of who bears the burden of persuasion for establishing prejudice or lack thereof when the Sixth Amendment violation involves the transmission of confidential defense strategy information. The First Circuit held that where confidential defense strategy information is transmitted to the prosecution and the defendant makes a prima facie showing of prejudice, the burden then shifts to the prosecution to prove that there was no prejudice to the defendant from the

> disclosure. *Cinelli v. City of Revere*, 820 F.2d 474, 478, 480 (1987); accord, *United States v. Mastroianni*, 749 F.2d 900, 907-908 (CA1 1984). This position conflicts with the approach of other Circuits of requiring the defendant to prove prejudice. *United States v. Steele*, 727 F.2d 580, 586-587 (CA6), cert. denied sub nom., *Scarborough v. United States*, 467 U.S. 1209, 104 S.Ct. 2396, 81 L.Ed.2d 353 (1984); *United States v. Irwin*, 612 F.2d 1182, 1186-1189 (CA9 1980). It also conflicts with a third position that once a defendant shows that the prosecution has improperly obtained confidential defense strategy information or has intentionally placed an informer in the defense camp, then no showing of prejudice is required, for those acts constitute a per se violation of the Sixth Amendment. *United States v. Costanzo*, 740 F.2d 251, 254-255 (CA3 1984), cert. denied, 472 U.S. 1017, 105 S.Ct. 3477, 87 L.Ed.2d 613 (1985). Because of these conflicting approaches among the Circuits, I would grant certiorari.

This case presents an identical issue. As indicated below, in the years since the dissent in *Cutillo*, the circuits have continued to split on this important question.

2. The Courts Of Appeal Are Deeply Divided On The Burden Of Proving Prejudice.

In the years following the denial of certiorari in *Cutillo v. Cinelli*, the Courts of Appeal have continued to yield divergent standards regarding the prejudice test in attorney-client intrusion cases.

The Eleventh Circuit had adopted an approach similar to that of the First Circuit, requiring a habeas defendant to make a prima facie showing of prejudice, with the burden then shifting to the prosecution to disprove prejudice from the disclosures. In *United States v. Cross*, 928 F.2d 1030, 1053 (11th Cir. 1991), the Court required the defendant to produce

evidence of a "realistic possibility of injury to [the defendant] or benefit to the State" (*citing Weatherford v. Bursey*, 429 U.S. 545, 558 (1977)).

In *Cross*, the defendant contended that the prosecution improperly obtained confidential strategy in the form of an ex parte witness list. The Court noted:

> Moreover, Cross has failed to describe how the revelation of his witness list prejudiced his case, and he has not contradicted the government's contention that they already knew the nature of his defense and the identities of many of his witnesses.

Cross, 928 F.2d at 1053. By contrast, prior to the opinion of the Tenth Circuit in the subject case, the Tenth Circuit had adopted a divergent view of the prejudice standard. In *Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995) the Court of Appeals determined that where a deliberate attorney-client intrusion occurred, and the intrusion lacks legitimate law enforcement purposes, the communication of defense strategy information constitutes a *per se* violation of the Sixth Amendment. Id. at 1140, *citing Briggs v. Goodwin*, 698 F.2d 486, 493, n. 22 (D.C. Cir.), *reh'g granted, opinion vacated, and on reh'g*, 712 F.2d 1444 (D.C. Cir. 1993), *cert. denied*, 464 U.S 1040 (1984).

Significantly, the Court in *Shillinger* noted:

> Because of the absence of an adequate fact finding procedure in this case, we do not know whether the deputy relayed any other information to the prosecutor ... we know that it is, of course, impossible to know what information obtained by the prosecution from the deputy was used at trial without knowing the extent of the information that was obtained.

Shillinger, 70 F.3d at 1138. The Tenth Circuit in *Shillinger* interpreted the rule of this Court in *United States v. Morrison*, 449 U.S. 361, 364 (1980) this way:

Thus, the Court appeared to recognize that *Weatherford* – and the prejudice articulated in that case – does not necessarily govern potential intrusions by the prosecution that lack a legitimate purpose.

Schillinger, 70 F.3d at 1140. The *Shillinger* rule was specifically decided in light of "the split of authority" among the circuits. *Id.* at 1141.

The vitality of the reasoning in *Shillinger* is in question, however, because of the decision of the Tenth Circuit panel in the subject appeal. The Court of Appeals in this case made only a cursory footnote reference to *Shillinger*. The Court noted that the trial court had misapplied *Shillinger's* language that "seemingly limited the remedy of a new trial or the dismissal of an indictment only where 'evidence has been wrongfully admitted.'" *Kennedy* III, 225 F.3d at 1195, n.5.

However, the Tenth Circuit in this appeal did not explain why *Shillinger* should not apply to the prosecution's pre-indictment attorney-client intrusion into defense strategy, which continued into its post-indictment discussions with the former defense law clerk. Thus, there appears to be not only a split within the circuits, but also a split within the Tenth Circuit itself.

3. The State Courts Have Noted The Need For Supreme Court Guidance.

Since this Court's denial of certiorari in *Cutillo v. Cinelli*, two state appellate courts have recognized the unresolved question regarding the burden of proving prejudice, or disproving prejudice, in connection with habeas corpus motions attacking prosecutor misconduct in obtaining privileged attorney-client defense information.

In *State v. Quattlebaum*, 527 S.E.2d 105,108 (S.C. 2000) the Supreme Court of South Carolina indicated, "[i]n 1988, the Supreme Court declined to hear a case that would have resolved a hopeless conflict among the circuits on that issue,"

further lamenting the lack of "federal guidance" on the question presented here.

In *People v. Benally*, 208 Cal. App. 3d 900, 909 (Cal. 1989), the California Court of Appeals noted the defendant's argument "that the issue of who bears the burden of persuasion regarding prejudice or the lack thereof when the Sixth Amendment violation involves the transmission of confidential information to the Government has not yet been resolved by the Supreme Court" (citing *Cutillo v. Cinelli*, *supra*). The Court of Appeals did not disturb the trial court ruling that the burden was on the Government to disprove the presumption of prejudice that accompanies the transmission of confidential information from the defense camp to the prosecution.

In the present case, by contrast, the interviews between the Assistant U.S. Attorney and a key member of petitioner's legal defense team were not known until well after petitioner's jury trial and his subsequent conviction and sentencing. That fact is primarily due to the AUSA having made a misleading statement to petitioner's trial counsel in which he denied that his contacts with the former defense law clerk had anything to do with the WMC case.

A failure of this Court to resolve the issue regarding burden of proof on the existence of prejudice could prove to be an indirect inducement to unethical prosecutors to conceal attorney-client invasions rather than disclose them.[7] In those circuits where the requirement of prejudice creates a high and forbidding barrier, discovering the truth of prosecutorial misconduct and achieving justice will prove an increasingly formidable, if not a nearly impossible task.

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[7] Happily, some prosecutors zealously guard against government intrusion into privileged defense information. Petitioner's co-counsel at the district level, in his former career as a federal prosecutor, had occasion to alert a trial judge when he discovered such an improper attorney-client intrusion by his federal agents. *United States v. Orman*, 417 F.Supp.1126 (D.Colo. 1976).

B. FIFTH AMENDMENT CASES

In considering and rejecting petitioner's Fifth Amendment claim, the Court of Appeals in the subject case adopted the test for "prejudice" found in *United States v. Voigt*, 89 F.3d at 1067.

In *Voigt*, the court indicated:

> [I]n order to raise a colorable claim of outrageousness pertaining to alleged governmental intrusion into the attorney-client relationship, the defendant's submissions must demonstrate an issue of fact as to each of the three following elements: . . . (3) actual and substantial prejudice.

Id. at 1067. The Court of Appeals in the subject case found that "the district court made no findings regarding the first two elements of the *Voigt* test."[8] *Kennedy* III, 225 F.3d at 1195. However, this "actual and substantial prejudice" test collides with this Court's requirement of only a "substantial threat" of prejudice in *United States v. Morrison*, 449 U.S. at 365-66.

The Ninth Circuit has also adopted the *Voigt* test requiring "actual and substantial prejudice." In *United States v. Haynes*, 216 F. 3d 789, 794-797 (9th Cir. 1999), the Court upheld the trial court's suppression of evidence the government gleaned from a defense attorney's investigator, though "the government was vigilant about the attorney-client privilege and established safeguards so as not to learn facts that could be subject to privilege." One trial court within the District of Columbia Circuit has also adopted the third prong of the *Voigt* test regarding prejudice. *United States v. Hsia*, 81 F. Supp.2d 7, 19 (D.D.C. 2000).

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[8] The first two elements under *Voigt* are: "(1) the government's objective awareness of an ongoing, personal attorney-client relationship between its informant and the defendant; [and] (2) deliberate intrusion into that relationship." *Voigt*, 89 F.3d at 1067.

By contrast, the Eleventh and the Seventh Circuit Courts of Appeal have adopted a more relaxed requirement relating to "prejudice" under the Fifth Amendment. The Eleventh Circuit only requires proof of a "realistic possibility of injury to [the defendant] or benefit to the state." *Cross*, 928 F.2d at 1053 (*citing Weatherford*, 429 U.S. at 558); *see also*, *United States v. Ofshe*, 817 F.2d 1508, 1516 (11th Cir. 1987) (requiring that the defendant produce some "demonstrable evidence of prejudice").

In the Seventh Circuit, the Court of Appeals indicated that a Fifth Amendment claim of attorney-client invasion would be upheld if it were shown that any evidence produced at trial by the government "stem[med] directly or indirectly from any information" obtained in violation of the attorney-client privilege. *United States v. White*, 970 F.2d 328, 336 (7th Cir. 1992).

Thus, for these reasons, this Court should resolve the conflict among the circuits regarding the appropriate burden and standard of "prejudice," not only under the Sixth Amendment, but under the Fifth Amendment, as well.

II. THE COURT OF APPEALS DECISION MUST BE REVERSED BECAUSE IT HOLDS THAT THE GOVERNMENT MAY BREACH ATTORNEY-CLIENT PRIVILEGE WITH IMPUNITY UNDER THE SIXTH AMENDMENT AS LONG AS IT DOES SO WITH A FORMER MEMBER OF THE LEGAL DEFENSE TEAM.

The Court of Appeals in the subject case, relying on *United States v. Rogers*, 751 F.2d 1074, 1077-78 (9th Cir. 1985), ruled that attorney-client intrusions by the government that only involved *former* attorneys or their assistants do not implicate the Sixth Amendment. *See Kennedy* III, 225 F.3d at 1194, where the court stated:

> However, these interviews occurred after Mr. Danley had left Mr. Kennedy's employ. Consequently, there could have been no invasion of

Mr. Kennedy's attorney-client relationship with Mr. Danley resulting from these interviews.

The Seventh Circuit has also adopted this reasoning. *White*, 970 F.2d at 333.

Other courts of appeal, in interpreting the *Rogers* rule, have construed it differently. In *United States v. Edgar*, 82 F.3d 499, 507 (1st Cir. 1996), the Court cited *Rogers*, not for the proposition that the deciding factor on the application of the Sixth Amendment was whether the person interviewed was a *current* as opposed to *former* player within the attorney-client privilege but rather for the fact that in *Rogers*, the legal counsel was "not criminal defense counsel."

By contrast, in *United States v. Costanzo*, 740 F.2d 251, 254 (3rd Cir. 1984), the court considered a Sixth Amendment attorney-client intrusion claim where it upheld the finding of the trial court that no attorney-client relationship existed during the critical phase between the government informant and his supposed client. Nevertheless, the court held that the Sixth Amendment *could* be violated by the government's collaboration with a person who had a *former* attorney-client relationship with the defendant. *Id.*

The rule that government prosecutors can violate the attorney-client privilege of a defendant with impunity as long as they interview only *former* defense attorneys and their law clerks is a conclusion that strikes at the heart of the attorney-client privilege and is at violent variance with the expectations of every client who seeks legal assistance from an attorney. It is also at variance with this Court's refusal to accept legal constructions that "introduce[d] substantial uncertainty into the privilege's application." *Swindler & Berlin v. United States* 524 U.S. at 403, 409.

The Tenth Circuit opinion in this case means that every *former* defense attorney and his legal staff can be targeted for interview by government agents, or being subpoenaed in grand jury proceedings, with no constitutional protection for the client. This ruling must be reviewed and reversed.

III. PETITIONER HAS SHOWN A PRIMA FACIE CASE OF OUTRAGEOUS GOVERNMENT MISCONDUCT UNDER THE FIFTH AMENDMENT.

The Court of Appeals indicated:

> Nor has [Kennedy] shown the prosecution's actions in interviewing Mr. Danley and gathering evidence from him during its investigation were sufficiently outrageous to support granting a new trial and dismissing the indictment. See *Morrison*, 449 U.S. at 365-67 and n. 3, 101 S.Ct. 665.

Kennedy III, 225 F.3d at 1196-97.

In Kennedy's § 2255 petition to the trial court he attached an affidavit from his trial counsel, David Lane, who indicated that prior to the WMC trial he had inquired of the AUSA about government's contact with Mr. Danley. The prosecutor assured Mr. Kennedy's defense counsel that Mr. Danley had nothing to do with the WMC case. The Court of Appeals was also mindful that Mr. Danley verified that this statement was false and misleading, in his sworn declaration that was submitted with the motion to supplement the appeal record. *Kennedy* III, 225 F.3d at 1192, n. 2.

The Tenth Circuit's failure to find "outrageousness" in the government prosecutor's actions stands in stark contrast to other cases finding outrageousness in attorney-client intrusions. *United States v. Schell*, 775 F.2d 559 (4th Cir. 1985) (outrageous conduct under the Fifth Amendment found in assistant district attorney's participation in the prosecution of the case where he had formerly represented a defendant in direct conjunction with the same matter); *United States v. Omni Int'l. Corp.*, 634 F.Supp. 1414 (D.Md. 1986) (outrageous conduct found under the Fifth Amendment based, in part, on government agents manipulating a former secretary of an attorney into sharing attorney-client privileged information); *United States v. Sabri*, 973 F.Supp. 134 (W.D. N.Y. 1996) (government manipulation of the attorney-client

relationship, including the taping of conferences with client violated the Fifth Amendment); *United States v. Marshank*, 777 F.Supp. 1507 (N.D. Cal. 1991) (outrageous conduct within the Fifth Amendment found where government collaborated with the defense attorney to build a case against the defendant).

While there is a line of cases adverse to finding sufficient "outrageous" conduct warranting dismissal or a new trial in attorney-client invasions, those cases usually involve "contraband offenses," and are hinged on the difficulties of detection of drug offenses in the absence of undercover government involvement. *Ofshe*, 817 F.2d at *1516 (citing Hampton v. United States*, 425 U.S. 484, 495, n. 7 (1973)). However, because the instant case does not involve a contraband offense, that line of cases is easily distinguishable.

For the foregoing reasons, this Court should grant Kennedy's petition for writ of certiorari to articulate those factors or standards applicable to the "outrageousness" test under the Fifth Amendment in attorney-client intrusion cases.

IV. THE SIXTH AMENDMENT IS VIOLATED WHEN THERE ARE POTENTIALLY PREJUDICIAL DEFENSE STRATEGY DISCLOSURES PRE-INDICTMENT AND A CONTINUUM OF DELIBERATE ATTORNEY-CLIENT INVASIONS POST-INDICTMENT.

A. THE CIRCUITS ARE SPLIT ON WHETHER THE SIXTH AMENDMENT CAN BE IMPLICATED "PRE-INDICTMENT."

In this case, the Tenth Circuit flatly concluded that "government intrusions into pre-indictment attorney-client relationships do not implicate the Sixth Amendment." *Kennedy* III, 225 F.3d at 1194.

This bright line test making the Sixth Amendment only applicable post-indictment is in line with the decisions of several other circuits. *United States v. Moody*, 206 F.3d 609

(6th Cir. 2000), *cert. denied* _____ U.S. _____, 121 S.Ct. 301 (2000); *United States v. Ingle*, 157 F.3d 1147, 1151 (8th Cir. 1998); *Knight v. Singletary*, 50 F.3d 1539, 1548 (11th Cir. 1995).

However, at least two circuits have indicated the possibility that the Sixth Amendment can be implicated in pre-indictment proceedings. In *Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995) the Court indicated:

> We recognize the possibility that the right to counsel might conceivably attach before any formal charges are made, or before an indictment or arraignment, in circumstances where the "government had crossed the constitutionally significant divide from fact-finder to adversary." *United States v. Larkin*, 978 F.2d 964-969 (7th Cir. 1992), cert denied 507 U.S. 935 (1993).

See also, United States ex rel. Hall v. Lane, 804 F.2d 79, 82 (7th Cir. 1986).

B. THE REALISTIC POSSIBILITY OF PREJUDICE IN PRE-INDICTMENT GOVERNMENT MISCONDUCT SHOULD CREATE A PRESUMPTION OF PREJUDICE IN SUCH MISCONDUCT WHEN IT CONTINUES POST-INDICTMENT.

In *United States v. Harrison*, 213 F.3d 1205 (9th Cir. 2000)[9] the Court concluded that where the defendant had retained counsel during the grand jury, pre-indictment proceedings, that relationship with legal counsel prevented the government from interviewing him post-indictment in the

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[9] *United States v. Hayes*, 231 F.3d 663 (9th Cir. 2000)(*en banc*) is not to the contrary. *Hayes* determined that the Sixth Amendment did not prohibit the taping of a conversation between defendant and his co-conspirator in absence of counsel even though he had been afforded counsel during a pre-indictment deposition. However, in *Hayes* there was no continuum of conduct that created a nexus between the pre-indictment proceeding and the post-indictment phase of the case.

absence of his counsel pursuant to the rule of *Michigan v. Jackson*, 475 U.S. 625, 635 (1986).

The Ninth Circuit Court rejected the government's argument "that pre-indictment representation has no bearing on (post-indictment) invocation" of the right to counsel. *Harrison*, 213 F.3d at1211. In *Harrison*, the Court accepted the defendant's argument "that his ongoing attorney-client relationship with [his attorney] 'carried over' into the post-indictment phase," for purposes of the applicability of the Sixth Amendment. *Id.* at 1210.

Likewise, we would submit that Kennedy's proof of a realistic possibility of prejudice in the pre-indictment interviews between the AUSA and Danley should create a presumption of a continuum of such potential prejudice in the post-indictment attorney-client intrusions by the AUSA. This is so, because there was a "close nexus between investigation and indictment." *Id.* at 1215.

Such a rule is preferable to the bright line test articulated by the Tenth Circuit in this case. The Court of Appeals in the subject case indicated:

> Mr. Kennedy admits some of the information he asserts Mr. Danley gave the prosecution was turned over before the indictment was issued. Government intrusions into pre-indictment attorney-client relationships do not implicate the Sixth Amendment ... thus, Mr. Kennedy is not entitled to an evidentiary hearing to explore alleged intrusions that occurred before July 2, 1992 [the day of the indictment].

Kennedy III, 225 F.3d at 1194 (citations omitted).

V. THE COURT OF APPEALS ERRED IN DENYING PETITIONER'S MOTION TO SUPPLEMENT THE APPEAL RECORD.

After oral argument in the subject appeal, but before the Court of Appeals issued this decision, petitioner came into possession of newly discovered evidence that proved substantial prejudice to Kennedy's case as a result of both pre-indictment and post-indictment interviews between the AUSA and former law clerk, Danley. The defense submitted a newly obtained affidavit from Danley (*see* Appendix D), who had been inaccessible during his residence in Argentina, but who had been served with civil process in Kennedy's civil action for damages when Danley returned to the United States for personal business. After several months of vigorously defending the civil suit, and on the eve of a court hearing to determine jurisdiction in the civil case, Danley announced his willingness to discuss the truth of his collaboration with the prosecution a few weeks after oral argument in the Tenth Circuit case. His affidavit resulted. *See* Appendix C.

In rejecting the defense motion to supplement the appeal record with the Danley affidavit, the Court of Appeals recognized its inherent authority to consider supplementation of the appeal record, even though the affidavit had not been before the trial court. *Kennedy* III, 225 F.3d at 1192. The Tenth Circuit adopted the three prong test outlined in *Ross v. Kemp*, 785 F.2d at 1474-1475.

In *Ross* the Court indicated three non-exclusive factors which would guide decisions on motions to supplement an appeal record with material not presented to the district court: (1) whether "acceptance of the proffered material into the record would establish beyond any doubt the proper resolution of the pending issue;" (2) the remand for the district court to consider the additional material would be contrary to the interest of justice and a waste of judicial resources; and (3) whether supplementation is warranted in light of the "unique powers that federal appellate judges have

in the context of habeas corpus actions." *Kennedy* III, 225 F.3d at 1191, *citing Ross*, 785 F.2d at 1475.

In *Ross*, the Court permitted the record to be supplemented with affidavits containing newly discovered evidence acquired after the trial court ruling where "the evidence in the proffered affidavits does significantly affect the analysis of the issue," *Id.* at 1475, n. 15, even though the *Ross* court acknowledged that in that case the first factor was not satisfied.

The Court of Appeals in the subject appeal, however, converted the first *Ross* factor into a necessary precondition. The Court, without describing or expanding on its evaluation of the extensive affidavit (or even describing its contents), concluded:

> [E]ven if we were to conclude Mr. Danley's affidavit makes a stronger case for Mr. Kennedy's arguments concerning invasion of the attorney-client relationship, we could not conclude it "would establish beyond any doubt the proper resolution of the pending issue[s]."

Kennedy III, 225 F.3d at 1192.

Specifically, the Court found that "Mr. Danley's affidavit does not remove our doubt concerning the existence of prejudice resulting from the alleged intrusions." *Id.* at 1192. Further, the fact that evidence pointed to the AUSA having lied to Kennedy's defense counsel about the content of his interviews with Danley, was deemed insufficient to invoke its discretion to supplement the record with the Danley affidavit. *Id.* at 1192, n.2.

Yet, by any reasonable reading, the Danley affidavit not only proves substantial and obvious prejudice to Kennedy's defense, the proof of prejudice is nearly overwhelming. *See* Appendix C, and D.

Admittedly, this Court has left primarily to the discretion of the Courts of Appeals the question of when, and under

what conditions, such courts are to exercise their discretion in taking up matters not passed upon at the trial court level. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). Nevertheless, in light of the "new restrictions on successive petitions" for habeas corpus under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244, noted in *Felker v. Turbin*, 518 U.S. 651, 664 (1996), this Court should intervene to ensure that courts of appeal adequately address the interests of justice in evaluating motions to supplement the appeal record in pending first time habeas corpus petitions.

By treating the first factor of Ross as a precondition before permitting an appeal record to be supplemented, the Court of Appeals departs from other courts which have permitted supplementation even when the submitted material would not conclusively resolve the issue on appeal. *See Young v. City of Augusta, Georgia, appearing in Devaney*, 59 F.3d 1160 (11th Cir. 1995).

Even further, in the habeas corpus context, the Tenth Circuit's refusal to consider the Danley affidavit in the pending case leaves Kennedy no alternative (absent a grant of certiorari in this case) but to submit a second or successive petition for habeas corpus, this time including the Danley affidavit for the Court's review. Judging by the near-absolute and monotonous regularity with which the courts of appeals have denied such second or successive petitions in light of the provisions of the AEDPA[10], the denial of the motion to supplement unjustly burdens Kennedy's right to habeas corpus relief.

In *Felker v. Turbin*, this Court held that the increased restrictions under the AEDPA on second or successive habeas corpus petitions do not, on their face, constitute the

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[10] In deciding "second or successive" petitions since the AEDPA, the Courts of Appeal have denied some one hundred and twenty applications for permission to file such petitions. *See* Appendix E, Table of Cases Denying Second or Successive § 2255 Habeas Corpus Petitions.

suspension of a writ of habeas corpus in violation of Article I, § 9, Clause 2, of the U.S. Constitution. Nevertheless, this Court did recognize that:

> The new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice "abuse of the writ". . . "the doctrine of the abuse of the writ refers to a complex and evolving body of principles."

Felker, 518 U.S. at 664. That ruling does not, however, also mean that the AEDPA is constitutional in its *application*.

That "evolving body of equitable principles" (*Felker, supra*) that undergird the "abuse of the writ" concept which has been refined under the AEDPA, can hardly be reconciled with refusals to entertain newly discovered evidence during pending appeals on first time habeas corpus petitions, where such refusals force that newly discovered evidence to be addressed under the near-Olympian standards for "second or successive" petitions.

To avoid a potential constitutional infirmity in the AEDPA in its *application*, this Court should address those standards applied by the Courts of Appeal in rejecting newly discovered evidence presented in motions to supplement the appeal record in pending first-time habeas corpus cases.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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February 13, 2001

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 98-1421

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM R. KENNEDY, JR.,
Defendant-Appellant,

FILED
United States Court of Appeals
Tenth Circuit

SEP 20 2000

PATRICK FISHER
Clerk

Appeal from the United States District Court for the District of Colorado (D.C. No. 97-B-816)

Sean Connelly (Thomas L. Strickland, United States Attorney; Stacey L. Ross, Assistant United States Attorney, with him on the brief), Assistant United States Attorney, Denver, Colorado, for Plaintiff-Appellee.

Craig L. Parshall (James Rouse, Englewood, Colorado; Daniel T. Smith, Denver, Colorado, with him on the briefs), Fredericksburg, Virginia, for Defendant-Appellant.

Before **TACHA, HOLLOWAY** and **BRORBY**, Circuit Judges.

BRORBY, Circuit Judge.

Petitioner William R. Kennedy, Jr. appeals from the district court's denial of an evidentiary hearing and other relief regarding Mr. Kennedy's petition to vacate, set aside, or correct his sentence under 28 U.S.C. §. 2255, alleging prosecutorial misconduct and ineffective assistance of counsel. We exercise jurisdiction under 28 U.S.C. §§ 1291 and 2253, and deny Mr. Kennedy's request for a certificate of appealability and dismiss his appeal.

I. BACKGROUND

On July 2, 1992, Mr. Kennedy was charged in two separate indictments by a federal grand jury. *United States v. Kennedy*, 29 F. Supp.2d 662, 665 (D. Colo. 1998). In one of the indictments, the grand jury charged Mr. Kennedy committed mail and wire fraud, racketeering and money laundering, from 1984 through 1988. The grand jury found Mr. Kennedy, acting as the president of Western Monetary Consultants, Inc. (Western), was involved in "a massive Ponzi scheme to defraud numerous precious metals investors." *United States v. Kennedy*, 64 F.3d 1465, 1468 (10th Cir. 1995). The other indictment charged Mr. Kennedy with crimes arising from his failure to report funds received from Kuwaiti officials. *Kennedy*, 29 F. Supp.2d at 665-66. These funds were to be used to support efforts to end the occupation of Kuwait by the Iraqi army. *Id.* at 666. Only the indictment charging Mr. Kennedy with crimes arising from his involvement in the precious metals scheme led to the convictions at issue in this appeal.

In Mr. Kennedy's trial for his involvement in Western's operations, the prosecution argued Mr. Kennedy intended to defraud his customers when, rather than purchasing the precious metals the customers ordered, he (1) lost their money by speculating in the future's market; (2) used it to fund conservative causes and organizations; and spent it on operating expenses, executive compensation and generating new sales. Mr. Kennedy's theory of defense was that he was unable to fill precious metals orders because he had

mismanaged the company. After a seven week trial, the jury found Mr. Kennedy guilty of one count of racketeering in violation of 18 U.S.C. §§ 1962(c) and 1963; nine counts of aiding and abetting mail fraud in violation of 18 U.S.C. §§ 2 and 1341; and seven counts of aiding and abetting money laundering in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i) & (2). *Kennedy*, 64 F.3d at 1469; *Kennedy*, 29 F. Supp.2d at 666. The court sentenced him to twenty years in prison. This court affirmed Mr. Kennedy's conviction on direct appeal, but indicated Mr. Kennedy could pursue his ineffective assistance of counsel claim in a collateral proceeding. *Kennedy*, 64 F.3d at 1474-75, 1481 (10th Cir. 1995).

Mr. Kennedy subsequently filed the 28 U.S.C. § 2255 petition at issue alleging various claims including ineffective assistance of counsel and claims relating to prosecutorial misconduct. The district court determined all of the claims Mr. Kennedy asserted were procedurally barred except his claims of ineffective assistance of counsel and the prosecutorial misconduct claims relating to the prosecution's alleged intrusion into Mr. Kennedy's relationship with his attorney. As to these remaining claims, the district court denied Mr. Kennedy's request for an evidentiary hearing concluding "the petition, files, and record of this case conclusively demonstrate that he is not entitled to § 2255 relief," and denied his habeas petition. *Kennedy*, 29 F. Supp.2d at 686. Mr. Kennedy subsequently filed a timely notice of appeal and a request for a certificate of appealability. After oral argument in the present appeal, Mr. Kennedy filed a motion with this court requesting leave to supplement the record on appeal to include an affidavit which was not before the district court.

II. DISCUSSION

A. Motion to Supplement the Record on Appeal

We first address Mr. Kennedy's request to supplement the record before this court. The evidence Mr. Kennedy wishes to include in the record on appeal consists of an

affidavit from Keith Danley. In 1989 and 1990, Mr. Danley was a paralegal and law clerk at the law firm of Brown, Arvanitis & McDonnell (Brown & McDonnell), a firm that represented Mr. Kennedy. After taking the bar exam, Mr. Danley left Brown & McDonnell and became an employee of Mr. Kennedy in October 1990. In his motion to supplement the record, Mr. Kennedy alleges Mr. Danley acted as his attorney in connection with both civil and the potential criminal matters arising from Mr. Kennedy's actions as president of Western. He asserts the prosecution intentionally invaded that relationship to gather information used against Mr. Kennedy in the criminal prosecution at issue in this case and in formulating its trial strategy. Mr. Kennedy asserts Mr. Danley's affidavit supports these allegations. However, the evidence which Mr. Kennedy seeks to introduce was not a part of the record before the district court.

Federal Rule of Appellate Procedure 10(e) authorizes the modification of the record only to the extent it is necessary to "truly disclose[] what occurred in the district court." Fed. R. App. 10(e). This court will not consider material outside the record before the district court. *See In re Capital Cities*, 913 F.2d 89, 96 (3d Cir. 1990). In *Anthony v. United States*, 667 F.2d 870, 875 (10th Cir. 1981), *cert. denied*, 457 U.S. 1133 (1982), we stated Rule 10(e) "allows a party to supplement the record on appeal" but "does not grant a license to build a new record." *Id.* (citing cases). Because the affidavit was not before the district court, Rule 10(e) does not countenance supplementing the record in this instance. *See Allen v. Minnstar, Inc.*, 8 F.3d 1470, 1475-76 (10th Cir. 1993); *United States v. Walker*, 601 F.2d 1051, 1054-56 (9th Cir. 1979).

Nevertheless, Mr. Kennedy argues this court should exercise its "inherent equitable authority" to enlarge the record on appeal. Mr. Kennedy points to our decision in *Allen v. Minnstar, Inc.*, as an authority for this argument. In *Allen*, we concluded the district court did not err by denying the appellant's request to add to the record portions of a deposition which were not before the district court when it

ruled on the appellees' motion for summary judgment. *Allen*, 8 F.3d at 1474. In making this determination, we quoted from *Jones v. Jackson Nat'l Life Ins. Co.*, 819 F. Supp. 1385, 1387 (W.D. Mich. 1993). *Id.* While denying a motion to supplement the record on appeal because the proposed evidence was not before the court at the time its final decision was made, the *Jones* court noted the court of appeals may have "an 'inherent equitable power' to supplement the record exceeding the power provided in Rule 10(e)," but concluded any such power is not to be exercised by the district court. *Jones*, 819 F. Supp. at 1387 (citations omitted). Although in *Allen* we included the above statement from *Jones*, we did not address the issue of whether this court may, and under what circumstances should, allow the augmentation of the record on appeal to include evidence not before the district court. *See Allen*, 8 F.3d at 1474-1476. Rather, we simply determined supplementation was not appropriate under the circumstances. *See id.* Even so, Mr. Kennedy urges us to adopt the reasoning of other courts of appeals concerning the "inherent equitable power" of the court of appeals to supplement the record on appeal.

In support of his argument, Mr. Kennedy urges us to follow the reasoning of the Eleventh Circuit in *Ross v. Kemp*, 785 F.2d 1467 (11th Cir. 1986), where the court recognized its "inherent equitable authority" to supplement the record on appeal to include material not before the district court. *Id.* at 1474-75. The *Ross* court set forth the following non-exclusive list of factors it would consider when deciding to supplement the record on appeal: 1) whether "acceptance of the proffered material into the record would establish beyond any doubt the proper resolution of the pending issue;" 2) whether remand for the district court to consider the additional material would be contrary to the interests of justice and a waste of judicial resources; and 3) whether supplementation is warranted in light of the "unique powers that federal appellate judges have in the context of habeas corpus actions." *Id.* at 1475. The *Ross* court determined the movant had not established the first factor, and had not

established the threshold issue of whether his failure to present the information before the district court was the result of excusable neglect. *Id.* at 1476. However, the *Ross* court concluded based on the facts of that case, the interests of justice demanded remand to the district court to determine whether to allow Mr. Ross to supplement the record and if so, to determine whether an evidentiary hearing was warranted. *Id.* at 1477-79.[1]

We are not persuaded by Mr. Kennedy's argument. Although *Ross* is not controlling precedent in this circuit, we agree with the Eleventh Circuit that, under some

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[1] In *Ross*, the movant (Mr. Ross) requested leave to supplement the record on appeal after the Eleventh Circuit had issued its opinion affirming the district court's denial of an evidentiary hearing on Mr. Ross' request for habeas relief and after the parties had filed their briefs on his motion for an en banc hearing. *Id.* at 1470, 1476, 1477. Mr. Ross claimed the jury was illegally composed – not representative of the community – and that his right to a fair trial was therefore compromised. *Id.* at 1469-70. In his motion to supplement the record on appeal, Mr. Ross presented an affidavit by a statistician showing the racial and sexual composition of the county where he was tried and comparing it to the jury lists for the years immediately preceding and following the year Mr. Ross was tried. *Id.* at 1467, 1472-73. The affidavit showed a significant discrepancy between the gender and racial composition of the population and the composition of the jury lists. *Id.* at 1473 & n.10. In considering whether to allow Mr. Ross to supplement the record on appeal, the court noted this was not the type of case where it would normally allow supplementation of the record on appeal, but listed the three factors set forth above it would consider when deciding whether to exercise its authority to allow supplementation of the record on appeal. *Id.* at 1475. The court went on to explain this was not an exclusive list of the factors to be considered, and indicated this issue is most appropriately determined on a case-by-case basis. *Id.* The court finally concluded, although Mr. Ross had failed to establish the proffered material "would establish beyond doubt he is entitled to a full evidentiary hearing," or the failure to present the evidence before the district court was not the result of inexcusable neglect, the interests of justice would best be served by remanding to the district court for an evidentiary hearing to determine the threshold question of whether his failure to present the evidence was due to inexcusable neglect. *Id.* at 1476-77.

circumstances, we have an inherent equitable power to supplement the record on appeal. However, we conclude the present case is not one which would come under that rare exception to Rule 10(e), and is distinguishable from *Ross*.

The *Ross* court determined the interests of justice would best be served by remanding to the district court for an evidentiary hearing to determine the threshold question of whether Mr. Ross' failure to present the evidence before the district court was the result of inexcusable neglect. *Id.* at 1476-77. The court reached this conclusion because it was concerned the "apparent negligence on the part of Ross' attorneys may have been due to their reliance on misrepresentations by the state official who had legal custody of the records." *Id.* at 1477. The court also expressed its concern that the state officials refused to produce the other records and they were apparently inconsistent in disclosing jury lists to different attorneys in different cases. *Id.* Finally, because it was reviewing a capital murder case, and due to the extremely serious nature of the constitutional error asserted and the fact the proffered evidence would "have a definite impact on [Mr. Ross'] ability to prove the illegal composition of his grand and traverse juries," the court decided to invoke its inherent authority and remanded to the district court for a hearing to resolve the threshold issue of inexcusable neglect. *Id.* at 1477.

In the present case, however, there is no indication the government was lying to Mr. Kennedy's attorney concerning the location of records or was refusing to produce information. Furthermore, even if we were to conclude Mr. Danley's affidavit makes a stronger case for Mr. Kennedy's arguments concerning invasion of the attorney-client relationship, we could not conclude it "would establish beyond any doubt the proper resolution of the pending issue[s]." *See id.* at 1475. As discussed below, the main issue before us is whether Mr. Kennedy has made a sufficient showing of prejudice from the alleged intrusions to warrant an evidentiary hearing. Mr. Danley's affidavit does not remove

our doubt concerning the existence of prejudice resulting from the alleged intrusions.[2] Consequently, we conclude the circumstances in the present case do not lead us to believe the interests of justice would best be served by exercising our inherent equitable power to allow Mr. Kennedy to supplement the record on appeal or by remanding the issue to the district court. For all the reasons stated above, we deny Mr. Kennedy's request to supplement the record on appeal to include Mr. Danley's affidavit.

B. Certificate of Appealability and Standard of Review

We next address the standard of review governing Mr. Kennedy's request for a certificate of appealability.[3] Because Mr. Kennedy's request for a certificate of appealability was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L.No. 104-132, 110 Stat. 1214 (April 24, 1996), his right to appeal is governed by the AEDPA. *See Slack v. McDaniel*, ___ U.S. ___, 120 S. Ct. 1595, 1603 (2000); *Tillman v. Cook*, 215 F.3d 1116, 1120 (10th Cir. 2000).

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[2] In his affidavit, Mr. Danley accuses AUSA Peters of lying about the content of the government's interviews with Mr. Danley. However, we do not find these accusations sufficient to justify exercising our inherent authority to supplement the record on appeal to include this affidavit.

[3] The district court did not rule on Mr. Kennedy's request for a certificate of appealability within thirty days after Mr. Kennedy filed his notice of appeal. Under our Emergency General Order of October 1, 1996, we deem the district court's failure to issue a certificate of appealability within thirty days after filing the notice of appeal as a denial of the certificate. *See United States v. Riddick*, 104 F.3d 1239, 1241 n.2 (10th Cir. 1997), *overruled on other grounds, United States v. Kunzman*, 125 F.3d 1363 (10th Cir. 1997). We note the district court ultimately granted Mr. Kennedy a certificate of appealability, but for reasons not evident in the record before us, that certificate did not issue until two months after Mr. Kennedy filed his notice of appeal. Given the untimeliness of the district court's ruling, we construe this appeal as Mr. Kennedy's request to this court for a certificate of appealability. *Cf. id.* (where the petitioner made no request for a certificate of appealability, we construed his appeal as a request for a certificate of appealability).

In order for this court to grant a certificate of appealability and proceed to the merits of Mr. Kennedy's appeal, he must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In addressing the requirements of obtaining a certificate of appealability under § 2253(c), the Supreme Court recently stated the petitioner must show a substantial denial of a constitutional right by demonstrating "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack*, ___ U.S. at ___, 120 S. Ct. at 1603-04 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 and n.4 (1983)) (further quotation marks omitted). *See also Tillman*, 215 F.3d at 1120. A review of the record establishes Mr. Kennedy failed to make the requisite showing for a certificate of appealability. For the foregoing reasons, we deny Mr. Kennedy's request for a certificate of appealability and dismiss his appeal.

Keeping in mind the standard of review governing a request for a certificate of appealability, we note our standard of review over the district court's determination of a 28 U.S.C. § 2255 motion is clearly established. "[W]e review the district court's legal rulings on a § 2255 motion de novo and its findings of fact for clear error." *United States v. Pearce*, 146 F.3d 771, 774 (10th Cir. 1998); *accord United States v. Blackwell*, 127 F.3d 947, 950 (10th Cir. 1997). Under 28 U.S.C. § 2255, the district court is required to conduct an evidentiary hearing "[u]nless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief." *United States v. Lopez*, 100 F.3d 113, 119 (10th Cir. 1996) (quotation marks and citation omitted). For the following reasons, we conclude the district court did not abuse its discretion by denying Mr. Kennedy's request for an evidentiary hearing.

A. Sixth Amendment Right to Counsel

Mr. Kennedy argues the district court erred by failing to grant him an evidentiary hearing to determine whether his right to effective counsel as guaranteed by the Sixth Amendment to the Constitution was compromised by the government's alleged invasion into his attorney-client relationship. Specifically, he contends the government used Mr. Danley as a source of information in its criminal prosecution of Mr. Kennedy in the case at issue.

Mr. Danley worked at Brown & McDonnell from June 1989 to October 1990. He then began to work for Mr. Kennedy and received his license to practice law in May 1991. Both parties admit there is a factual dispute concerning whether Mr. Danley acted in the capacity of an attorney for Mr. Kennedy after he began to work for Mr. Kennedy exclusively. However, Mr. Danley had left Mr. Kennedy's employ by June 27, 1991. As mentioned above, the indictment was filed July 2, 1992. Mr. Kennedy admits some of the information he asserts Mr. Danley gave the prosecution was turned over before the indictment was issued. Government intrusions into pre-indictment attorney-client relationships do not implicate the Sixth Amendment. *See United States v. Lin Lyn Trading, Ltd.*, 149 F.3d 1112, 1117 (10th Cir. 1998); *United States v. Kingston*, 971 F.2d 481, 491 (10th Cir. 1992). Thus, Mr. Kennedy is not entitled to an evidentiary hearing to explore alleged intrusions that occurred before July 2, 1992.

Mr. Kennedy further contends, however, the prosecution invaded his attorney-client privilege by interviewing Mr. Danley after Mr. Kennedy was indicted. However, these interviews occurred after Mr. Danley had left Mr. Kennedy's employ. Consequently, there could have been no invasion of Mr. Kennedy's attorney-client relationship with Mr. Danley resulting from these interviews. *See United States v. Rogers*, 751 F.2d 1074, 1077-78 (9th Cir. 1985) (where defendant's former attorney divulged confidential information to the

Internal Revenue Service during its pre-indictment investigation of the defendant, the court concluded the Sixth Amendment was not implicated, although the former attorney may have breached his ethical obligation of confidentiality). Thus, we conclude the cases Mr. Kennedy cites in support of his Sixth Amendment argument are inapplicable.[4]

A. Fifth Amendment Due Process Violation

In support of his request for an evidentiary hearing, Mr. Kennedy contends the government's alleged intrusion into his attorney-client relationship with Mr. Danley so infected the entire investigation and trial that his Fifth Amendment right to due process was violated and he has suffered irreparable harm. While a claim of a Sixth Amendment violation based on intrusion of attorney-client privilege is limited to government action which interferes with legal representation after the initiation of criminal proceedings, we acknowledge a defendant may claim his or her rights under the Due Process Clause have been violated by prosecutorial misconduct occurring prior to indictment.

Misconduct by law enforcement officials in collecting incriminating evidence may rise to the level of a due process violation when the misconduct is outrageous enough to shock the conscience of the court. *Rochin v. California*, 342 U.S. 165, 172-74 (1952) (where police obtained evidence against the defendant by pumping his stomach, the Court determined

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[4] We also conclude Mr. Kennedy is not entitled to an evidentiary hearing on his Sixth Amendment claim because Mr. Kennedy has failed to show the prosecution obtained any material privileged information concerning the case at issue during the post-indictment meetings with Mr. Danley. The meeting Mr. Kennedy emphasizes most occurred in 1993, after the indictment. According to Mr. Danley's testimony in the Kuwait case, the purpose of this meeting was for Mr. Danley to locate ten pages of notes he had taken while working for Mr. Kennedy. Mr. Danley searched through ten file boxes, but was unable to locate these notes. Likewise, there is nothing in the record to indicate any of the subsequent meetings Mr. Danley had with members of the prosecution team yielded any privileged information concerning the Western case.

the officers' actions offended the Due Process Clause). *See also United States v. Russell*, 411 U.S. 423, 431-32 (1973) (where the government supplied the defendant with materials to commit the crime and the defendant claimed governmental misconduct in violation of the Fifth Amendment, the Court stated there could be a situation where "the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction," but concluded the case before it was "not of that breed."). Other courts have concluded governmental misconduct in the form of a pre-indictment invasion of a defendant's attorney-client relationship may, under some circumstances, amount to a deprivation of the defendant's right to due process. *See United States v. Schell*, 775 F.2d 559, 562-63, 566 (4th Cir. 1985) (holding defendants' due process rights were violated when their attorney represented them during grand jury proceedings, and then participated in their prosecution after indictments were issued in the same matter), *cert. denied*, 475 U.S. 1098 (1986); *United States v. Marshank*, 777 F. Supp. 1507, 1521-23 (N.D. Cal. 1991) (concluding pre-indictment intrusion into the attorney-client relationship was so pervasive and prejudicial as to warrant dismissal of the indictment where the defendant's attorney participated in the investigation of his client and the government knowingly assisted the attorney in violating the attorney-client privilege and hid the violation from the court). *But see Rogers*, 751 F.2d at 1076, 1078-80 (holding defendants' former attorney breached his ethical duties to his former clients by divulging confidential information to the IRS during its pre-indictment investigation of the defendants, but concluding no prejudice to the defendants resulted justifying the dismissal of the indictment and the government engaged in no misconduct by interviewing the defendants' former attorney).

In *United States v. Voigt*, 89 F.3d 1050 (3rd Cir.), *cert. denied*, 519 U.S. 1047 (1996), the court applied due process principles to a pre-indictment intrusion into the defendant's relationship with his attorney. *Id.* at 1066. In *Voigt*, the

defendant contended the government had used his attorney as an undercover agent to gather privileged information as part of the government investigation. *Id.* at 1061, 1064. The *Voigt* court held:

> in order to raise a colorable claim of outrageousness pertaining to alleged governmental intrusion into the attorney-client relationship, the defendant's submissions must demonstrate an issue of fact as to each of the three following elements: (1) the government's objective awareness of an ongoing, personal attorney-client relationship between its informant and the defendant; (2) deliberate intrusion into that relationship; and (3) actual and substantial prejudice.

Id. at 1067. We consider the Third Circuit's test as set forth in *Voigt* to be a reasonable method of evaluating Fifth Amendment claims based on allegations of an invasion of the attorney-client relationship. We therefore adopt it as our own.

In the present case, the district court made no findings concerning the first two elements of the *Voigt* test. Rather, it concluded Mr. Kennedy had failed to show sufficient prejudice flowing from the alleged intrusions to warrant a new trial, the dismissal of the indictment, or an evidentiary hearing. In making this determination, the district court only discussed the evidence actually introduced at trial and the fact that Mr. Danley never testified at trial.[5] However, Mr.

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[5] The district court relied upon our opinion in *Shillinger*, 70 F.3d at 1142-43, and the Supreme Court case of *United States v. Morrison*, 449 U.S. 361, 364-65 (1980), in determining Mr. Kennedy was not entitled to an evidentiary hearing on these claims. The court pointed out the only evidence introduced at trial which was derived from the alleged intrusion was the check used in the government's attempt to refresh Mr. Korpi's memory and thereby impeach his testimony. The court implicitly concluded any prejudice resulting from the use of this check was slight, not reaching the level of outrageousness necessary to sustain a claim for a violation of due process based on prosecutorial misconduct, because it was never admitted into evidence. The court also pointed out Mr. Danley never testified at trial, and concluded because any other information allegedly gathered by the government from Mr. Danley was not

Kennedy's Fifth Amendment claim focuses on the government's method of investigating its case against him. The district court should have considered not only the evidence admitted in this case, but also any information the government allegedly received from Mr. Danley during its investigation. *See Marshank*, 777 F. Supp. at 1521-23. Nevertheless, after examining all of the information Mr. Kennedy alleges the government discovered in violation of his attorney-client relationship, we conclude Mr. Kennedy has not made the requisite showing of prejudice to warrant an evidentiary hearing.[6] Under the *Voigt* test set forth above, the

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introduced at trial, Mr. Kennedy had failed to show he was entitled to relief based on his claims of Fifth and Sixth Amendment violations flowing from the alleged invasion of his attorney-client relationship. Although we agree with the district court's ultimate conclusion, we note the present case is distinguishable from *Shillinger* in that Mr. Kennedy is presenting a claim of prosecutorial misconduct flowing from invasion of his relationship with his attorney during the investigative stage of the prosecution. *Shillinger* dealt with a Sixth Amendment claim, and seemingly limited the remedy of a new trial or the dismissal of an indictment only where "the evidence has been wrongfully admitted." *Shillinger*, 70 F.3d at 1143 (quoting *Morrison*, 449 U.S. at 365) (quotation marks omitted). However, the *Morrison* Court did not impose such a limitation on claims brought under the Fifth Amendment. *Morrison* involved a Sixth Amendment claim of pre-indictment intrusion in to the attorney-client relationship. 449 U.S. at 363. The *Morrison* Court distinguished cases alleging Fifth Amendment violations and pointed out in that case "[t]here [was] no claim [] of continuing prejudice which, because it could not be remedied by a new trial of suppression of evidence, called for more drastic treatment. *Id.* at 365-66 and n.2.

[6] Mr. Kennedy asserts his claims were supported in the record by: 1) a confidential attorney-client letter from his counsel which later surfaced in the prosecutor's files; 2) a photocopy of the check used to discredit Mr. Korpi; 3) the so-called "speculation" letter from Mr. Danley to Mr. Kennedy urging him to "stop speculating"; 4) information concerning potential prosecution and defense witnesses; 5) information that the prosecution had seized Western documents considered most important to Mr. Kennedy's defense team; 6) information concerning Mr. Kennedy's plans to repay Western's creditors; 7) information concerning a privately published novel about Mr. Kennedy which he alleges provided the

party asserting a Fifth Amendment violation must make a showing of all three elements. *Voigt*, 89 F.3d at 1067. Mr. Kennedy has not shown how the government's use of the allegedly privileged information "infected the trial to such an extent that it resulted in a fundamentally unfair trial." *Fox v. Ward*, 200 F.3d 1286, 1299 (10th Cir. 2000) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974). Nor has he shown the prosecution's actions in interviewing Mr. Danley and gathering evidence from him during its investigation were sufficiently outrageous to support granting a new trial or dismissing the indictment. *See Morrison*, 449 U.S. at 365-67 and n.3. Consequently, we conclude the district court did not abuse its discretion by failing to grant Mr. Kennedy an evidentiary hearing.

E. Ineffective Assistance of Counsel

Finally, Mr. Kennedy contends the district court erred by failing to grant him an evidentiary hearing on the issue of ineffective assistance of counsel. Mr. Kennedy asserts:

> The question of whether attorney Lane should have moved to suppress all [Western]-related information divulged by [Mr.] Danley following its brief disclosure in Plaintiff's Hearing Exhibit Ten

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prosecution with a "road map" for its case. Rather than expanding this opinion to include and in-depth analysis of every piece of information Mr. Kennedy asserts the prosecution obtained through Mr. Danley, we assure the parties we have examined the record and conclude Mr. Kennedy has shown no prejudice resulting from the alleged intrusions into his relationship with Mr. Danley. Although the government may have a duty to rebut an assertion it obtained information in violation of the attorney-client privilege, *see Lin Lyn Trading, Ltd.*, 149 F. 3d at 1116, the burden remains on the petitioner in a § 2255 proceeding to show a deprivation of a constitutional right. 28 U.S.C. § 2253(c)(2). In light of all of the evidence offered against him in the seven week trial, Mr. Kennedy has not convinced us he was in any way prejudiced by the discovery of the allegedly privileged information. Thus, we need not address his argument concerning the government's failure to come forward with an explanation for how it received the information Mr. Kennedy claims came from his attorney.

> warrants a full evidentiary hearing on trial counsel's effectiveness in conducting an adequate investigation, or the reasonableness of his reliance on the prosecutor's assurances that Mr. Danley had nothing to do with the [Western] case.

(Footnotes and citations omitted.)

"A claim of ineffective assistance of counsel presents a mixed question of law and fact which we review de novo." *Hickman v. Spears*, 160 F.3d 1269, 1273 (10th Cir. 1998) (quotation marks and citation omitted). In order to obtain habeas relief for ineffective assistance of counsel," "petitioner must establish both that his attorney's representation was deficient and that he was prejudiced by that deficiency." *James v. Gibson*, 211 F.3d 543, 555 (10th Cir. 2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "An ineffective assistance claim may be resolved on either performance or prejudice grounds alone." *Fox*, 200 F.3d at 1295. In order to show prejudice, the petitioner must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "There is a strong presumption that counsel provided effective assistance, and a section 2255 defendant has the burden of proof to overcome that presumption." *United States v. Williams*, 948 F. Supp. 956, 960 (D. Kan. 1996), *cert. denied*, 522 U.S. 1033 (1997). In the present case, the district court determined Mr. Kennedy failed to show his counsel's assistance fell below an objective standard of reasonableness or that he was prejudiced by his counsel's performance. We agree.

As explained above, Mr. Kennedy has failed to show how his defense was prejudiced by the government's alleged possession of the information obtained through Mr. Danley. Thus, any failure on the part of his counsel to investigate further into the source of that evidence was harmless. Furthermore, Mr. Danley never testified, and the only

evidence presented at trial which was obtained through him was the "Korpi" check. As explained above, this check was never entered into evidence. The prosecutor used it to refresh Mr. Korpi's memory in an attempt to impeach his testimony. We conclude this episode had little possibility of affecting the outcome of the trial. Therefore, Mr. Kennedy has failed to make the requisite showing he was prejudiced by his trial counsel's failure to request suppression of all the evidence obtained through Mr. Danley. Thus, the district court did not err by determining Mr. Kennedy was not entitled to an evidentiary hearing on the issue of ineffective assistance of counsel.

We therefore **AFFIRM** the order of the district court denying Mr. Kennedy an evidentiary hearing and deny Mr. Kennedy a certificate of appealability.

Appeal **DISMISSED**.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMEIRCA,

Plaintiff - Appellee,

v. No. 98-1421

WILLIAM R. KENNEDY,

Defendant - Appellant

Before **TACHA, HOLLOWAY** and **BRORBY**, Circuit Judges.

William R. Kennedy's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /S/
K. Fabrizio, Deputy Clerk

APPEAL NO. 98-1421

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA	)	
	)	
Plaintiff-Appellee	)	
	)	
v.	)	**No. 98-1421**
	)	
WILLIAM R. KENNEDY, JR.,	)	
	)	
Defendant-Appellant	)	

On Appeal from the United States District Court
For the District of Colorado
The Honorable Lois Babcock
District Judge

MOTION TO SUPPLEMENT THE RECORD

The above Appellant, William R. Kennedy Jr., by his undersigned counsel, hereby MOVES this Court for an Order permitting Appellant to supplement the record before this Court pursuant to Fed. R. App. P. 10 (e)(3). Accordingly, Appellant, by his counsel, shows to the Court as follows:

1. Appellant seeks to supplement the record in this appeal with materials that, heretofore, have not been filed in the U.S. District Court, to-wit: a signed and sworn Declaration of Keith Danley, dated March 9, 2000. Keith Danley is arguably the single most

central figure in the arguments of Appellant for his right to a new trial under 28 U.S.C. sec. 2255. Appellant and his counsel have been unable to reasonably secure these materials at any earlier date.

2. Oral argument in this appeal was had on January 23, 2000. To counsel's knowledge, this Court has not yet issued its decision.

3. Appellant has previously alleged that the prosecution improperly violated his attorney-client privilege by interviewing, and receiving evidence from Mr. Keith Danley, a former key member of William Kennedy's legal defense team. This assertion was made consistently throughout brief of Appellant: Appellant's Brief, pgs. 3-8, 12, 14, 16-30.

LOCATING AND INTERVIEWING KEITH DANLEY

4. For several years, William Kennedy and his attorneys were generally aware that Keith Danley was reported to be living and working in Argentina. Mr. Danley had indicated as much in his testimony in the "Kuwait" trial in 1995.

5. In 1999 William Kennedy's legal counsel learned of Keith Danley's current whereabouts in Argentina, and that he was scheduled to return to the United States in September, 1999, to attend a wedding. At that time the undersigned was investigating, as counsel for William Kennedy, the possibility of bringing a civil action on behalf of Mr. Kennedy against Keith Danley. In August, 1999, a state court civil action was filed with William Kennedy as plaintiff and Keith Danley as defendant.

6. In September, 1999, Keith Danley was served with a copy of the civil complaint in South Dakota while attending a wedding.

7. Keith Danley moved to remand the civil action from State Court to Federal Court. Once in Federal Court, Keith Danley requested, and obtained, an extension of time to respond to plaintiff's complaint.

8. In November, 1999, Keith Danley filed a motion to dismiss civil action for a lack of jurisdiction, or, in the alternative, transfer of venue. His moving papers indicated that he was still residing and working in Argentina.

9. In February, 2000, the undersigned, as counsel for Mr. Kennedy, filed an opposition to these motions of Keith Danley. At that time, a notice of deposition a Mr. Danley was served, scheduling his deposition for February 28, 2000, to which Mr. Danley objected.

10. On February 21, 2000, pursuant to the request of Mr. Danley, the undersigned counsel telephoned Mr. Danley at a telephone number in Argentina to discuss the civil case. In that telephone conversation, Mr. Danley indicated a willingness to discuss with Mr. Kennedy's attorneys Mr. Danley's prior dealings with the federal prosecutors in Denver in connection with the prosecution of William Kennedy relating to Western Monetary Consultants ("WMC").

11. On March 7th and 8th, 2000, Appellant's counsel, Craig L. Parshall and Dan Smith, met with Keith Danley and discussed Mr. Danley's prior cooperation with the federal prosecutors in connection Mr. Kennedy's criminal case. The result of that discussion is a sworn Declaration of Keith Danley, which is attached to this motion.

THE COMPELLING NATURE OF THE DANLEY DECLARATION: PROSECUTORIAL MISCONDUCT BOTH BEFORE AND AFTER INDICTEMENT

12. Mr. Danley confirms, in great detail, the arguments of Appellant that the prosecution violated Mr. Kennedy's attorney-client relationship with the Brown & McDonnell law firm, and Steve Mayo, Mr. Kennedy's prior criminal lawyer, by interviewing Keith Danley, who was a former paralegal with the Brown & McDonnell law firm and who was a key member of the Kennedy defense team and who coordinated the activities between the Brown & McDonnell law firm's defense of Mr. Kennedy's civilly, and Mr. Mayo, who was preparing a defense for Mr. Kennedy criminally.

13. In sum, Mr. Danley concludes that the federal prosecutor "manipulated me into breaching the attorney-client relationship and attorney work-product privilege regarding William Kennedy starting in September of 1991 and continuing into the months after my July 1, 1992, Grand Jury testimony [indictments were issued on July2, 1992], and into 1993."[1] Danley Dec. Par. 12 (14-15).

PROSECUTIORAL INTRUSION INTO ATTORNEY-CLIENT PRIVILEGE AFTER INDICTMENT

14. Mr. Danley shared with the prosecutor the results of an attempted preparation of William Kennedy, by his attorneys and Mr. Danley, for upcoming civil depositions and his potential appearance before the criminal Grand Jury relating to the WMC

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[1] Apparently Mr. Danley was the last Grand Jury witness before the indictment was issued. Mr. Danley testified in his second Grand Jury testimony on July 1, 1992. App. Vol. IV, at 454. (documents under seal). The indictment was issued the next day July 2, 1992.

investigation. Mr. Danley shared with the prosecutor that as a result of these meetings with Kennedy, in his opinion and attorney Mayo's opinion, Mr. Kennedy would not be a good witness. Information was given to the prosecutor resulting in a 'tip-off' to the fact that Mr. Kennedy would not likely be permitted by counsel to testify on his own behalf at the WMC trial. Decl. Par. 10 (a)(pg 12) At the WMC trial Mr. Kennedy, in fact, did not testify on his own behalf.

14. Mr. Danley assisted the prosecution with a time line chart of WMC that was being prepared as an exhibit for the WMC trial. Dec. par. 10 (g)(pg 13).

15. Mr. Danley discussed with the prosecutor the results of the Brown & McDonnell attorney-client privileged work in investigating the WMC finanacial failure and the significance of the various characters in the "Billy-Bob" novel that was reportedly based on William Kennedy and WMC. Dec. par. 10(c)(pg 13).

16 Mr. Danley gave privileged information to prosecution about the WMC defendants. Dec par. 10(d).

17. Mr. Danley shared with the prosecution his research at the Brown & McDonnell law firm and to whether or not WMC constituted a "Ponzi scheme." Dec. par.10(e).

18. Mr. Danley shared with the prosecution his opinion, derived from his work at Brown & McDonnell on the Kennedy cases, as to which WMC creditors would make the best prosecution witnesses. Dec. par.10(f).

PROSECUTORIAL INTRUSION BEFORE INDICTMENT

20. The federal prosecutor failed to protect William Kennedy's attorney-client privilege in interviewing Keith Danley. In contrast to the representations contained in the reported interview of the federal agents, the AUSA did not indicate that Keith Danley was to refrain from disclosing information derived from communications from Kennedy's prior criminal defense attorney, Steve Mayo. Dec. par.6(l)(pg 10).

21. Mr. Danley shared his "speculation memo" (App.180) with the prosecution which memo included his attorney-client privileged and attorney work-product privileged information gained while working at Brown & McDonnell. Mr. Danley shared that very speculation-versus-hedging distinction, and in the very same terms, that the prosecutor later incorporated into his closing argument at the WMC trial. Dec. par.6(a)(pgs 6-7).

22. Mr. Danley shared with the prosecutor his attorney-client privileged and attorney work product privileged impressions about William Kennedy's innocence of WMC related criminal charges and why he felt he was innocent. Dec. par.6(b)(7).

23. Mr. Danley handed the ASUA an attorney-client letter written to William Kennedy by his lawyer, reflecting dissention among some of his lawyers, and the existence of WMC microfilm. Dec. par.6(c)(pg 7).

24. Mr. Danley handed to the prosecutor ten pages of hand-written notes, and on two of the pages Mr. Danley had written down important information about defense witness Robert Korpi; information that based, partly, on Mr. Danley's knowledge of

Mr. Korpi derived from his work at the Brown & McDonnell law firm. Dec.par.6(d)(pg 8).

25. Mr. Danley delivered to the AUSA, a photcopy of the "Korpi check" used during the trial by the prosecutor. Dec. par.6(e)(pg 8).

26. Mr. Danley shared the results of his legal research at Brown & McDonnell as to whether or not Mr. Kennedy and WMC were guilty of securities violations as a predicate for RICO. Mr. Danley's conclusion was that there was no securities violation culpability of Kennedy or WMC. Although the prosecutor disagreed and contended early on that there was such liability, when the indictments were issued, a securities violation was not among the predicate crimes. Dec. par.6(f)(9).

27. Mr. Danley discussed the various true-life WMC persons who were characterized in the "Billy Bob" novel, which the prosecutor apparently considered as a road map to WMC/Kennedy's guilt. Dec.par.6(g)(pg 9).

28. Mr. Danley shared his information derived at the Brown & McDonnell law firm on WMC employees, some of whom were later indicted. Dec. par 6 (h)(pg 10).

29. Mr. Danley shared with the prosecutor information about the Brown & McDonnell investigation that indicated mismanagement of WMC as one of the causes of its financial troubles. Dec. par. 6(i)(pg 10).

30. Mr. Danley shared privileged information about some of Mr. Kennedy's prior lawyers. Dec. par.6(j)(pg 10).

31. Mr. Danley shared with the prosecutor his opinion, derived from his work at Brown & McDonnell

about the causes of WMC financial failure. Dec. par.6(k)(pg 10).

PROSECUTORIAL PRESSURE ON DANLEY: PROMISES OF NON-PROSECUTION

32. Mr. Danley indicates that he was concerned that he might be facing possible criminal indictment around December of 1991, concerning the matters he was sharing with the prosecutor. Dec. par.9. This fear of Mr. Danley originated as early as July 30, 1991, when a federal agent attempted to contact him by calling his wife and indicating that the federal agent wanted to talk to Mr. Danley about his "participation in Kennedy's operations." Based on the context of those comments, Mr. Danley had "apprehension whether the government was looking to possibly charge [him] criminally." Dec. par.4(c)(pg 4). However, the federal prosecutor struck a deal with Mr. Danley that "as long as I cooperated with him in the cases against Mr. Kennedy and others I would not be criminally prosecuted. However, Mr. Peters (the ASUA) said I would have to just 'trust' him in this regard, as he would not give me formal immunity, because formal immunity could be used to attack my credibility as a witness." Dec. par.9, pgs. 11-12.

PROSECUTORIAL MISREPRESENTATION: A KNOWING INTRUSION

33. Mr. Kennedy's trial counsel, attorney Lane, has executed an affidavit indicating that the federal prosecutor assured him that Mr. Danley had nothing to do with the WMC case. App. 289. Mr. Danley indicates that if ASUA Peters made such a comment, it would not be true based on the extensive interviews and information he had given to Mr. Peters about WMC matters. Dec. par.11 pg

14. Mr. Danley indicates that from day one Mr. Peters was fully aware that Mr. Danley was a former member of the legal defense team of William Kennedy. Dec.par.1 (pg. 2). Mr. Peters indicated the concern that Mr. Danley might "poison" his WMC case against Kennedy. Dec. par.1. As early as July 30, 1991, the federal agents were attempting to interview Keith Danley about "WMC matters prior to its bankruptcy in 1988." Dec. par.4(b).

WHEREFORE the Appellant William R. Kennedy, Jr., by his undersigned counsel, hereby requests that this Court grant the Appellant's motion to supplement the record with attached Declaration of Keith Danley.

The Appellant further moves this Court to reverse the conviction of Appellant and remand this matter for a hearing on whether Mr. Kennedy should be retried, or whether the illegal taint is so extensive that the indictment should be dismissed; or, in the alternative, for a remand to the U.S. District Court with instructions to conduct an evidentiary hearing on Appellant's motion for a new trial.

Respectfully submitted,

/S/_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 13, 2000, he served upon opposing counsel below, a copy of the foregoing pleading, by depositing a copy of the same in the U.S. mail, 1st Class, postage pre-paid, and properly addressed:

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Suite 1100
Denver, CO 80294

_____

Daniel T. Smith, Esq.

APPEAL NO. 98-1421

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA	)	
	)	
Plaintiff-Appellee	)	
	)	
v.	)	**No. 98-1421**
	)	
WILLIAM R. KENNEDY, JR.,	)	
	)	
Defendant-Appellant	)	

On Appeal from the United States District Court
For the District of Colorado
The Honorable Lois Babcock
District Judge

DECLARATION OF KEITH DANLEY

I Keith Danley hereby declare as follows:

1. I am an adult individual. I reside in the nation of Argentina with my wife and my child. I am a law school graduate. I was licensed to practice law in May of 1991, having passed the bar in the State of Pennsylvania. I graduated from law school in 1989. In the years 1988, and 1989 years I was employed as a paralegal/law clerk in the San Diego law firm of Brown & McDonnell (also known as Brown, Arvanitis & McDonnell), and I continued in that

employment until around October 12, 1990; as of around October 1990 I had terminated my employment with that law firm and began working directly with William Kennedy.

During the time of my employment with the Brown & McDonnell firm I worked extensively on civil and potentially criminal matters for William Kennedy who was one of their clients. I worked with attorney John Romaker of that firm on Kennedy cases, and I also worked with outside counsel Steve Mayo, who was William Kennedy's criminal legal counsel on Mr. Kennedy's potential criminal liability. Mr. Mayo had what I understood to be a joint defense relationship with our firm relating to Mr. Kennedy's legal matters, as much of the civil matters our firm was handling for Mr. Kennedy overlapped with the potential criminal exposure of Mr. Kennedy regarding his business, Western Monetary Consultants ("WMC").

I met with AUSA Peters on September 27, 1991 in Denver regarding his criminal investigation of Mr. Kennedy. That meeting is detailed below. However, in the first few minutes of that meeting it became very clear to me in my conversation with AUSA Peters that Mr. Peters was fully knowledgeable about my having been part of Mr. Kennedy's legal team while at Brown & McDonnell. AUSA Peters acknowledged this and indicated that he was concerned that I could be "poison" to his prosecution of Mr. Kennedy in the WMC case.

2. I have recently had conversations, on March 7, 2000 and March 8, 2000 with Mr. Kennedy's legal counsel, attorneys Craig L. Parshall and Dan Smith, regarding my dealings with former Denver federal prosecutor Steve Peters ("AUSA Peters") and A.J. Gehring, Special Agent with the Criminal Investigation Division of the IRS ("agent Gehring"), and Raymond Wedryk, Special Agent with the FBI ("agent Wedryk") regarding their criminal investigation, and prosecution of William Kennedy for his activities within WMC.

I was motivated to voluntarily discuss these matters with attorneys Parshall and Smith recently because of a lawsuit that was filed against me last year in California, by Mr. Kennedy through attorney Parshall and an attorney from California. That lawsuit alleged certain wrongdoing relating to my cooperation with the Denver U.S. Attorney's office (among other allegations) in their investigation and prosecution of Mr. Kennedy regarding WMC. Although I was living in Argentina, I returned to the United States to attend a wedding of my brother, and at that time Mr. Kennedy's attorneys, through a process server, served me with a copy of those lawsuit papers.

3. I was recently shown some of the documents that comprise the "Appellant's Appendix" in the above Kennedy appeal to the Tenth Circuit Court of Appeals. When I refer, in this Declaration, to "App. ___", that refers to the page number of the Appendix in that appeal.

4. On July 30, 1991 I was away from home on business. I had a telephone conversation with my then wife, Terri Danley on that date regarding a telephone conversation she very recently had with agent Gehring. Agent Gehring had called my wife and indicated:

(a). That he wished to talk to me regarding WMC's non-delivery of precious metals to its customers;

(b). He wanted to know what I knew about WMC matters prior to its bankruptcy in1988;

(c). He also wanted to know about my participation in Kennedy's operations.

In the context of what my wife related to me about agent Gehring's call to her and his interest in me, I had apprehension about whether the government was looking to possibly charge me criminally.

5. I had a telephone conversation with agent Gehring on or about September 17, 1991. At that time he indicated that the government wanted to talk to me regarding Mr. Kennedy

and WMC. I agreed to come to Denver to talk to them. Agent Gehring asked that I bring all of my records concerning WMC and Mr. Kennedy to that meeting. Before traveling to Denver I looked through my records, and I separated a few documents out that appeared to be attorney-client privileged regarding Mr. Kennedy. I then took the rest of the documents with me to Denver.

6. On September 27, 1991 I met in Denver with AUSA Peters and agent Gehring. In their presence I went through the documents I had brought with me, and had a discussion with them. In that meeting, among other things, AUSA discussed the line he was drawing as to when he had concluded the attorney-client privilege would apply to matters I knew as a result of working as part of the Kennedy legal defense team at Brown & McDonnell. AUSA Peters made it clear that everything that was dated on or after around October 12 or 15 of 1990 would be considered non-privileged and should be produced or discussed. So, for instance, if a document was dated on or after October 12 or 15 of 1990 then it would have to be produced. Things before that, per AUSA Peters, were arguably privileged.

Going into the meetings with AUSA Peters and the federal agents I had a pretty good idea that everything I knew about WMC, and Mr. Kennedy's relationship with it and activities in it, was derived from my work as a member of the Brown & McDonnell firm and as member of the Kennedy legal defense team, and was protected from disclosure by the attorney-client privilege and/or attorney-work product privilege.

During the meeting with AUSA Peters on September 27, 1991:

(a). Mr. Peters and I discussed some of my thoughts about what had caused WMC's financial losses pre-bankruptcy. I had investigated those issues while at Brown & McDonnell. I told Mr. Peters that I had concluded that some of WMC's financial problems had developed because of Mr.

Kennedy's speculation in the commodities futures market. I explained that Mr. Kennedy had made the mistake, in my opinion, of not distinguishing between commodities speculation and legitimate hedging. Mr. Peters appeared naïve about such issues in general, and also naïve regarding that issue involving WMC and Mr. Kennedy. In discussing this with AUSA Peters I used the example of lumber (a business I have had substantial experience with) where someone in the "lumber" business might hedge in the lumber market. But I told him that it appeared that Mr. Kennedy (who was a great salesman but in my opinion was not much of a businessman from a management standpoint) was actually "gambling" with customer's money by not knowing the difference between speculation and hedging.

In connection with this I gave AUSA Peters my memo of January 15, 1991 (App. 180) where I had disclosed this very same information about the "speculation" issue. This information contained in that memo was derived from my investigation into WMC while at Brown & McDonnell.

I was later surprised to learn that in AUSA Peter's closing argument in the WMC case against Mr. Kennedy (App. 633, lines 11 - 21) he actually used phrases and ideas that appear to match what I had discussed with him on September 27, 1991, such as references to "lumber" as an example of hedging a commodity, or "speculation," or "gambling, that it was betting against customers."

(b). In that meeting I explained my opinion about why, as a result of my work at Brown & McDonnell, I had come to the opinion that Mr. Kennedy was innocent of criminal charges regarding WMC in its activities prior to filing bankruptcy in 1988. When I discussed that, AUSA Peters appeared quite upset.

(c). Another document I gave to Mr. Peters in that meeting was a letter written from attorney John Romaker to Mr. Kennedy, his client. The letter was dated in 1991 (by then, attorney Romaker had left Brown & McDonnell and had

opened his own law office but was continuing to represent Mr. Kennedy). In that letter Mr. Romaker was relaying information to Mr. Kennedy about another of Kennedy's former attorneys (Sam Brown) who was threatening to do some things with the microfilm of the WMC records if his bill was not paid. This letter was handed over to USA Peters because it was dated after October 12 or 15 of 1990, according to the "line" AUSA Peters had established for me. This letter matches the discussion that is reflected in the report of interview of 9/27/91, App. 219, in the first large paragraph (" ... Danley recalls that KENNEDY owed Sam Brown money ... Brown threatened to send the microfilm which he had regarding WMC ...").

(d). In this meeting I handed over to AUSA Peters about 10 pages of my handwritten notes that I had made around October 15, 1990 when I was working with Mr. Kennedy directly; at that time I was attending some meetings in the Washington, D.C. area regarding Mr. Kennedy. On around pages two and three of those notes I had notes about Mr. Robert Korpi. My notes reflected, in part, my knowledge (gained from my work at Brown & McDonnell) of who Mr. Korpi was, and his importance to Mr. Kennedy and WMC as he was a substantial creditor of WMC, but he was also chairman of the creditor's committee in the Chapter 11 bankruptcy and was an admirer of Mr. Kennedy's. My notes were also based on My conversations with Mr. Korpi at that time.

(e). I also delivered to AUSA Peters at that time a photocopy of a check made payable to attorney John Romaker's trust account, from a trust account of Brown & McDonnell, in the amount of $5000 which bore the "memo" reference, "R. Korpi." App. 412. We discussed the "Kuwait money" as the source of the money in that trust account of the Brown & McDonnell firm. I notice that during the trial of the WMC case AUSA Peters told the Court that he was not sure (App. 623, lines 6-7) of the source of those funds. That

statement by AUSA Peters is not accurate, considering what he and I discussed.

(f). AUSA Peters and I discussed the results of my legal research at Brown & McDonnell that had convinced me that WMC and Mr. Kennedy had not engaged in any securities violations as a predicate act for RICO. AUSA Peters strongly disagreed with me. However I now notice that the Indictment in the WMC case did not charge Mr. Kennedy with securities violations, but rather, with mail fraud as a RICO predicate.

(g). AUSA Peters and I briefly discussed, at that time, a privately published novel called "Billy Bob and the Twenty Million Dollar Hole." I had gained information about the book while at Brown & McDonnell and had investigated who the various fictional characters corresponded to in real life within WMC. It was clear that AUSA Peters had a copy of the book, and considered it as a serious attempt to describe criminal wrong-doing within WMC and regarding Mr. Kennedy. We had ongoing discussions after that date also about that book and the various characters.

(h). AUSA Peters and I discussed various persons who had worked within WMC. I had information about such persons based on my work with Brown & McDonnell. Several of those persons at WMC were later indicted.

(i). AUSA Peters and I discussed our investigation at Brown & McDonnell into WMC and Mr. Kennedy, and our conclusion at Brown & McDonnell that the WMC financial problems were the result of mismanagement but not the result of criminal intent.

(j). AUSA Peters was interested in my opinions about several of Mr. Kennedy's prior lawyers who had represented him in WMC related matters and other matters. I had gained information about them, and their handling of Kennedy's legal matters from reading their research and reviewing their work product while at Brown & McDonnell. I gave Mr. Peters my impressions.

(k). AUSA Peters was interested in knowing my conclusions about where the money at WMC went to, that led to its financial problems. So I gave him my impressions and conclusions.

(l). I note that in the 9/27/91 report of interview (App. 212, starting at 8 lines from the top) that supposedly AUSA Peters:

> " ... advised Danley that we did [] want any records regarding communications or discussions between Steve Mayo and BILL KENNEDY or between BILL KENNEDY and Steve Mayo, nor do we want any discussions between Danley and Steve Mayo ..."

This above statement is not true, because I was not given such a warning. Instead, AUSA Peters concluded by saying that he did not want documents that were dated before October 12 or 15, 1990 from me.

7. After the 9/27/91 meeting I returned to my home in California and reviewed the documents that I had left behind. See: paragraph 5 above. As a result of the time "line" set by AUSA Peters (anything after October 12 or 15 was to be sent) I then sent other documents to him that I had kept back because of concerns about attorney-client privilege.

8. I have read the reports of interview dated after 9/27/91 (App. 224 - 258). I know that I had numerous meetings with AUSA Peters that are not documented in these reports of interview - and I had such meetings both before my first grand jury testimony in January 1992, and after my last grand jury testimony on July 1, 1992. As I understand it, the Indictment was issued on July 2, 1992.

9. In December of 1991 I had become concerned that I might be facing possible criminal indictment myself concerning the matters I was discussing with AUSA Peters. At that time AUSA Peters assured me that as long as I cooperated with him in the cases against Mr. Kennedy and others I would not be criminally prosecuted. However, Mr.

Supreme Court, U.S.
FILED

No. 01 001352 FEB 13 2001

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

William Kennedy

Petitioner,

v.

United States of America,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

Supplemental Appendix to Petition For Writ of Certiorari

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February 27, 2001

Balmar Legal Publishing Services, Washington, DC 202-682-9800

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Order Denying Petition for Rehearing 47a

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Judge

Civil Action No. 97-B-816
Criminal Action No. 92-CR-227-B

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

v.

WILLIAM R. KENNEDY,
Defendant-Petitioner.

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
NOV 2 1998

JAMES MANSPEAKER,
CLERK

MEMORANDUM OPINION AND ORDER

Babcock, J.

Defendant-Petitioner, William R, Kennedy, petitions to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (1997). Plaintiff-Respondent, United States of America ("the government"), objects to the petition on procedural and substantive grounds. The petition is adequately briefed and oral argument would not materially aid its resolution. Applying the relevant legal standards, I hold

that, with the exception of Mr. Kennedy's claims for ineffective assistance of counsel and intrusion into his attorney-client relationship, Mr. Kennedy's claims are procedurally barred pursuant to *United States v. Frady*, 456 U.S. 152 (1982). Because the petition, files, and records of the case conclusively show that Mr. Kennedy is entitled to no relief on his claims for ineffective assistance of counsel and intrusion into his attorney-client relationship. I deny his petition. Jurisdiction exists pursuant to 28 U. S C. § 1331.

1. PROCEDURAL HISTORY

On July 2, 1992, a federal grand jury returned two separate indictments. One indictment, bearing case number 92-CR-228-M (the "Kuwait case" or "Kuwait trial") (assigned to Chief Judge Richard P. Matsch), alleged that Defendant-Petitioner William R. Kennedy ("Mr. Kennedy"), along with Sam Zakhem ("Mr. Zakhem"), former United States Ambassador to Bahrain, and Scott Stanley ("Mr. Stanley") a journalist from Washington D.C., conspired to defraud the United States Department of Treasury in connection with their alleged failure to report money received from agents of Kuwait. Messrs. Kennedy, Zakhem, and Stanley allegedly received $7,700,000 from the Kuwaiti Ambassador to the United States and the Kuwaiti Emergency Finance Minister, which funds were to pay for an advertising campaign supporting the liberation of Kuwait, then occupied by Iraqi military forces.

The other indictment, bearing case number 92-CR-227-B (the "WMC case" or "WMC trial") (assigned to this Court), charged Mr. Kennedy and eighteen other defendants with one or more counts of racketeering, mail fraud, wire fraud, and/or money laundering in connection with their employment or association with Western Monetary Consultants, Inc. ("WMC"), the alleged racketeering enterprise. Mr. Kennedy was the President and owner of WMC. David Lane ("Mr. Lane") was Mr. Kennedy's court-appointed trial counsel in both the WMC case and the Kuwait case. The indictment in

the WMC case charged Mr. Kennedy and nine other defendants with participating in a racketeering enterprise, mail fraud, wire fraud, and money laundering during the four-year time period from January 1, 1984 to March 28, 1988. Essentially, the indictment charged that those defendants operated a "Ponzi" scheme to defraud investors of their money and precious metals. The other defendants in the WMC case, primarily telemarketers, were each charged with multiple counts of mail and wire fraud.

WMC sold precious metals to the general public over the telephone and, beginning in 1984, at seminars conducted throughout the United States. The seminars consisted of sales presentations designed to convince clients that world events warranted precious metals purchases. WMC targeted wealthy, elderly people with conservative political and religious beliefs. WMC sold precious metals with the promise that the price would be "locked in" at or about the time of the sale, and that WMC would effect the purchase immediately. The government charged that, in fact, WMC diverted its clients' money to other undisclosed uses, in many instances delaying the purchase and, in other instances, failing to purchase the metal at all. The uses of diverted client money included, but were not limited to, payment of expenses necessary to run WMC, purchase of other business enterprises, payment of expenses necessary to run other business enterprises, personal use by Mr. Kennedy and his family, and the purchase, refurbishment, and transport of a helicopter for Nicaraguan "freedom fighters" in Central America.

In March 1988, Mr. Kennedy sent letters to some of WMC's customers, wherein the wrote that WMC's failure to fill client orders resulted from the business' inability to keep pace with its tremendously fast growth. During trial, the government presented evidence showing that unwise speculation and intentional diversion of client funds for unauthorized purposes caused WMC's inability to fill orders. On March 28, 1988, WMC petitioned for bankruptcy under

Chapter 11 of the United States Bankruptcy Code. Over 600 investors were listed as creditors with losses in excess of $18,000,000. When WMC filed its petition for bankruptcy, the market value of unfilled orders approximated $37,162,000.

I granted severance of trial in the WMC case. Trial for the WMC telemarketers was ordered to follow trial for Mr. Kennedy and the other racketeering defendants. *See United States v. Kennedy ("Kennedy I")*, 819 F.Supp. 1510, 1513 (D.Colo.) (resolving pretrial motions), *aff'd sub nom. United States v. Byron*, 994 F.2d 747 (10th Cir. 1993). At trial, Mr. Kennedy did not testify on his own behalf. Mr. Lane, as Mr. Kennedy's trial counsel, presented evidence in an attempt to persuade the jury that Mr. Kennedy had no intent to defraud investors but, rather, mismanagement and other business factors led to WMC's inability to fill customer orders.

On September 20, 1993, after a seven-week trial in the WMC case, the jury convicted Mr. Kennedy of one count of racketeering in violation of 18 U.S.C. §§ 1962(c) & 1963, nine counts of aiding and abetting mail fraud in violation of 18 U.S.C. §§ 2 & 1341, and seven counts of aiding and abetting money laundering in violation of 18 U.S.C. §§ 2 & 1956(a)(1)(A)(i). The other racketeering defendants tried with Mr. Kennedy were acquitted, In accordance with the applicable sentencing guidelines, I sentenced Mr. Kennedy to 240 months in prison on January 5, 1994.

Mr. Kennedy, represented by different counsel, appealed his conviction in the WMC case on October 3, 1994. He argued that: (1) this Court abused its discretion by denying his requests for additional litigation and financial support in violation of the Due Process Clause of the Fifth Amendment of the United States Constitution and the Criminal Justice Act, 18 U.S.C § 3006A; (2) eight of the mail fraud convictions derived from insufficient evidence; (3) all of the money laundering convictions derived from a legally inadequate indictment, improper jury instructions, and insufficient evidence; (4) this Court erred by excluding certain evidence at

trial; and (5) Mr. Lane rendered ineffective assistance of counsel in violation of the Sixth Amendment of the United States Constitution. In affirming the judgment of conviction, the Court of Appeals rejected Mr. Kennedy's first four arguments and declined to address Mr. Kennedy's ineffective assistance of counsel argument because its resolution required factual determinations beyond the scope of the record on direct review. *See, generally, United States v. Kennedy ("Kennedy II")*, 64 F.3d 1465. 1474-1475 (10th Cir. 1995) (argued January 25, 1995; issued August 30, 1995).

The Kuwait case proceeded to trial during February and March 1995, but as to Mr. Zakhem only. After Mr. Zakhem's acquittal, the government moved for dismissal of all charges against Mr. Kennedy and Mr. Stanley.

Because his conviction in the WMC case became final before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996), Mr. Kennedy had until April 23, 1997 to file a § 2255 motion. *United States v. Simmonds*, 111 F.3d 737, 746 (10th Cir. 1997). Mr. Kennedy filed this petition on April 22, 1997, asserting multiple claims that he categorizes variously as: (1) prosecutorial misconduct; (2) commission of error by this Court in allowing the prosecutor to read the contents of a prejudicial exhibit in the jury's presence, in violation of the Due Process Clause of the Fifth Amendment of the United States Constitution; (3) improper reference to Mr. Kennedy's religious activities during trial, in violation of the First and Fifth Amendments of the United States Constitution; and (4) ineffective, assistance of trial counsel in violation of the Sixth Amendment of the United States Constitution.

II. PETITIONER'S ALLEGATIONS

Mr. Kennedy presents a tangled web of interrelated claims. Before addressing the government's procedural and substantive challenges to his claims, I first identify each of

Mr. Kennedy's specific contentions, thereby providing context for the analysis that follows.

a. "Prosecutorial Misconduct"

Mr. Kennedy asserts five claims that he categorizes as "prosecutorial misconduct." He alleges that the prosecution: (1) intentionally, recklessly, or knowingly intruded into his attorney-client relationship in violation of the Fifth and Sixth Amendments of the United States Constitution; (2) failed to disclose exculpatory evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963); (3) misrepresented material facts to Mr. Kennedy's trial counsel and the district court during the WMC case; (4) informally assured prosecutorial immunity to a grand jury witness; and (5) imposed an obligation of secrecy on a grand jury witness regarding the scope of the grand jury process. I discuss each allegation separately.

1. "Prosecutorial Misconduct:" Intrusion of Attorney-Client Relationship

The majority of Mr. Kennedy's § 2255 Claims derive from his relationship with Keith Danley ("Mr. Danley"), Mr. Kennedy's alleged attorney from May 1989 through December 1990 or January 1991. Mr. Danley graduated from California Western School of Law in 1989. Immediately thereafter, he worked as a law clerk or paralegal for Brown & McDonnell, a San Diego law firm that represented Mr. Kennedy in connection with various legal matters, including civil fraud suits relating to Mr. Kennedy's affiliation with WMC. In his § 2255 affidavit, Mr. Kennedy alleges, inter alia:

(a) During 1989, Mr. Danley informed Mr. Kennedy that he had graduated from law school and was "waiting to pass the bar exam and be licensed as an attorney." (Kennedy Aff. ¶ 5, Pet'r Ex. 1.)

(b) Mr. Danley worked closely with John Romaker ("Mr. Romaker"), an attorney with Brown &

McDonnell, on "all" civil cases brought against Mr. Kennedy for his involvement with WMC. (Aff. of Kennedy in ¶¶ 5-8.)

(c) While at Brown & McDonnell, Mr. Danley worked closely with several other attorneys representing Mr. Kennedy on various matters, including WMC's Chapter 11 bankruptcy, Mr. Kennedy's personal bankruptcy, Mr. Kennedy's potential grand jury testimony, and Mr. Kennedy's anticipated criminal defense. Mr. Danley worked closely with Stephen Mayo, a California attorney retained by Mr. Kennedy to handle criminal matters. (Aff. of Kennedy ¶¶ 7-11; Calendar of Brown & McDonnell of 9/14/89, Pet'r Ex. 4; Billing Statements of Mayo, Pet'r Ex. 35; Memo. from Brown to File of 10/27/99, Pet'r Ex. 36.)

(d) Mr. Danley sat for the California bar exam during the Summer of 1990. Mr. Danley told Mr. Kennedy later that Summer that he had passed the exam. (Aff of Kennedy 12, Pet'r Ex. 1.)

(e) Upon learning of Brown & McDonnell's demise, Mr. Kennedy offered to hire Mr. Danley as his in-house legal counsel during August 1990. Mr. Danley began working as in-house counsel during October 1990. Mr. Romaker also left Brown & McDonnell and began to work for Mr. Kennedy during October 1990 as "outside counsel." (Aff. of Kennedy ¶¶ 13, 23.)

(f) In October 1990, during his first week of working for Mr. Kennedy, Mr. Danley traveled to Washington D.C. to meet with Mr. Kennedy and Robert Korpi ("Mr. Korpi"), a creditor of WMC who became the chairman of a creditor's committee in the WMC bankruptcy case. Mr. Kennedy instructed Mr. Danley to meet with Mr. Korpi

regarding a joint venture unrelated to WMC, (Aff. of Kennedy ¶¶ 15-16.)

(g) From October 1990 through December 1990, Mr. Kennedy introduced Mr. Danley to other people as his "lawyer." Mr. Danley never contradicted Mr. Kennedy's characterization. (Aff of Kennedy ¶ 20; Aff. of Zakhem ¶¶ 3-4, Pet'r Ex. 24; Aff. of Stanley ¶¶ 34, Pet'r Ex. 25.)

(h) Sometime between December 1990 and January 1991, Mr. Danley informed Mr. Kennedy that had he had failed the bar exam. Mr. Danley also stated that he intended to sit for a future Pennsylvania bar exam. (Aff. of Kennedy ¶ 21.

(i) Mr. Kennedy introduced Mr. Danley to several key political and financial leaders from Argentina. They traveled together to Argentina during the Spring of 1991. Although they were supposed to take a second trip together to Argentina in May 1991, Danley canceled "at the last minute." During the May 1991 trip, Mr. Kennedy was stopped by United States and foreign government agents and searched for contraband. Upon arriving in Argentina, Mr. Kennedy discovered that his business associates had received anonymous letters "spreading numerous lies about [Mr. Kennedy] . . . and WMC." Upon arriving back in the United States, Mr. Kennedy discovered that other "sabotage" letters had been circulated to his business contacts. (Aff. of Kennedy ¶¶ 23-26, Pet'r Ex. 1.) The "sabotage" letters began on May 21, 1998 [sic] and continued through July 12, 1991. (Aff. of Kennedy ¶ 27; Misc. Corresp., Pet'r Ex. 5.)

(j) Mr. Danley authored the "sabotage" letters. In support of this allegation, Mr. Kennedy contends that: (a) Mr. Danley was one of the few people who had access to much of the information in the

"sabotage" letters; (b) after he suspected Mr. Danley, Mr. Kennedy purposefully leaked some information to Mr. Danley only, which information appeared in a subsequent "sabotage" letter, and (c) after June 25, 1991, Mr. Danley threatened to assist Mr. Kennedy's enemies, as evidenced by a series of memoranda. (Aff. of Kennedy ¶¶ 27-31.)

(k) Mr. Danley schemed to "destroy" Mr. Kennedy so that Mr. Danley could usurp Mr. Kennedy's Argentine business connections. (Pet'r Opening Brf. at 20.)

(l) Mr. Danley ceased working for Mr. Kennedy during June 1991; Mr. Romaker ceased working for Mr. Kennedy on April 11, 1991. (Aff, of Kennedy ¶¶ 22-23.)

Mr. Kennedy further alleges that Mr. Danley used his knowledge to assist the prosecution in both the WMC and Kuwait cases. Beginning in September 1991, Mr. Kennedy contends that Mr. Danley disclosed strategic information to A.J. Gehring, Special Agent with the Criminal Investigation Division of the Internal Revenue Service, and Steve Peters ("AUSA Peters"), the Assistant United States Attorney and lead prosecutor assigned to the WMC and Kuwait cases. (Pet'r Opening Brf. at 48-60 (citing, *inter alia*, Memo. of Telephone Conv. of 9/17/91, Pet'r Ex. 8).) The first meeting occurred on September 27, 1991 in Denver, Colorado. (Memo. 9/27/91 Interview, Pet'r Ex. 9.) Additional interviews occurred on the following dates: December 9, 17, 19, and 30, 1991; June 1 and 18, 1992; and January 4 and 17, 1994. (Misc. Memoranda of Interview, Pet'r Exs. 10-18.) Mr. Kennedy alleges that the prosecution also interviewed Mr. Danley during February 1992 and sometime during 1993, but such interviews are not memorized in reports. (Aff. Kennedy ¶ 33.) In addition to disclosing confidential information verbally. Mr. Danley allegedly delivered documents to AUSA Peters. (Pet'r Opening Brf. at 62 (citing, *inter alia*, Memo. of 9/27198 Interview at 4, Pet'r Ex. 9).) During these interviews,

AUSA Peters inquired about the possible existence of an attorney-client relationship, (*e.g.*, Memo. of 8/27/98 [sic] Interview at 1, Pet'r Ex. 9), but Mr. Kennedy alleges that AUSA Peters intentionally, recklessly, or knowingly intruded into Mr. Kennedy's attorney-client relationships to learn about defense strategies, tactics, and information, which information AUSA Peters then allegedly used during the WMC trial to aid Mr. Kennedy's prosecution. Mr. Kennedy was convicted on September 20, 1993 and sentenced on January 5, 1994.

Several weeks after Mr. Kennedy's sentencing in the WMC case, Mr. Zakhem's trial counsel in the Kuwait case moved to suppress evidence the prosecution allegedly derived from Mr. Danley. Although Mr. Danley did not testify during the WMC trial, the prosecution endorsed him as a witness for the Kuwait trial. Mr. Zakhem's trial counsel argued that an attorney-client relationship existed between Mr. Kennedy and Mr. Danley, which relationship applied to Mr. Zakhem by virtue of his entering into "joint enterprise" with Mr. Kennedy to liberate Kuwait from Iraqi military forces. Chief Judge Matsch conducted a suppression hearing, at which Mr. Romaker testified. Although present during that hearing, Mr, Danley never testified. On June 27, 1994, Chief Judge Matsch ruled that Mr. Zakhem failed to prove the existence of an attorney-client relationship, noting as follows:

> The core of defendants' contention is that at a debriefing interview in September 1991, Keith Danley disclosed privileged information to Assistant United States Attorney Stephen Peters and FBI Agent A.J. Gehring; that these government representatives knew or should have known that Danley was violating the privilege and that the subsequent investigation was tainted by the exploitation of such improperly obtained information. The record does not support a finding of intentional invasion of an attorney-client privilege, There is confusion and uncertainty about

> the status and role of Danley in the events leading up to the indictment. The relationship among the defendants, several organizations and a lawyer, John L. Romaker, are not well defined by the evidence or the law. Accordingly, the motions must be denied.

(Ord. of 6/27/94, Govt. Ex. 4.) A copy of the order was mailed to Mr. Lane.

2. "Prosecutorial Misconduct:" Failure to Disclosc Exculpatory Information

Mr. Kennedy also contends that the prosecutor failed to disclose exculpatory information as required by *Brady v. Maryland*, 373 U.S. 83 (1963), Mr. Kennedy cites four types of information that the prosecution allegedly filed to disclose before the WMC trial:

(a) reports of prosecution interviews of Mr. Danley (Pet'r Opening Brf. at 67);

(b) report of a prosecution interview of Mr. Romaker conducted on September 27, 1991 (disclosed January 24, 1994) (Pet'r Opening Brf. at 69);

(c) the existence and loss of ten pages of notes compiled by Mr. Danley during October 1990 (disclosed on March 1, 1995 by Mr. Danley during his testimony in the Kuwait trial) (Pet'r Opening Brf. at 69-70); and

(d) the fact of Mr. Danley's decision to conduct legal research during October 1990 and before he worked directly for Mr. Kennedy, which research inquired whether the attorney-client privilege applied to Mr. Danley's relationship with Mr. Kennedy (disclosed on March 1, 1995 by Mr. Danley during his testimony in the Kuwait trial) (Pet'r Opening Brf. at 70),

3. "Prosecutorial Misconduct:" Misrepresentation of Material Facts

Mr. Kennedy also avers that AUSA Peters misrepresented certain facts on two occasions. First Mr. Kennedy maintains that AUSA Peters told Mr. Lane that Mr. Danley had nothing to do with the WMC case. (Pet'r Opening Brf. at 72 (citing Aff. of Lane ¶¶ 4-6, Pet'r Ex. 23).) Second, Mr. Kennedy contends that AUSA. Peters lied in open court during the WMC trial about his knowledge of the source money purportedly paid by Mr. Kennedy as a preferential payment to Mr. Korpi, chairman of a creditors' committee in the WMC bankruptcy case. (Pet'r opening Brf. at 71-72.)

4. "Prosecutorial Misconduct:" Assurance of Informal Immunity to Mr. Danley

As his fourth "prosecutorial misconduct" claim, Mr. Kennedy contends that AUSA Peters gave an informal assurance of immunity, otherwise known as "pocket immunity," to Mr. Danley during December 1991 without following established statutory procedures for bestowing immunity to a prosecution witness. (Pet'r Opening Brf. at 73 (referencing Memo. of 12/30/91 at 1-2, Pet'r Ex. 13).)

5. "Prosecutorial Misconduct:" Imposition of Obligation of Secrecy on a Grand Jury Witness

Mr. Kennedy's last "prosecutorial misconduct" claim avers that AUSA Peters forced Mr. Romaker to remain silent regarding the grand jury proceedings to prevent Mr. Kennedy from learning about the scope of such proceedings. (Pet'r Opening Brf. at 75 (referencing Memo. of 1/14/91 at 1-2, Pet'r Ex. 18).)

b. Commission of Error by the District Court in Allowing the Prosecutor to Read the Contents of a Prejudicial Exhibit in the Jury's Presence

Mr. Kennedy alleges that the prosecution used privileged information derived from Mr. Danley to impeach Mr. Korpi, who testified as a character witness on behalf of Mr. Kennedy

during the WMC trial. Mr. Korpi was a creditor of WMC who became the chairman of a creditor's committee in the WC bankruptcy case. Although he invested and lost nearly $300,000, he testified during the WMC trial that Mr. Kennedy was "honest" and had "a high level of integrity." (WMC Trial Transcript at 4295, Pet'r Ex. 52.)

AUSA Peters attacked the credibility of Mr. Korpi on cross-examination by confronting him with a check made payable to Mr. Romaker, in the amount of $5,000.00, and bearing the notation "R. Korpi." The check was drafted against a trust account established by Brown & McDonnell in San Diego. AUSA Peters suggested that Mr. Romaker gave $5,000 to Mr. Korpi on Mr. Kennedy's behalf:

AUSA Peters:	And as you come here today to tell the jury about William Kennedy, isn't it true, sir, that you have received a payment facilitated by Mr. Kennedy for $5,000? Isn't that right, Mr. Korpi?
Mr. Korpi:	$5,000?
AUSA Peters:	That's right, sir.
Mr. Korpi:	I received $5,000?
AUSA Peters:	That's right.
Mr. Korpi:	From Kennedy?
AUSA Peters:	That's my question.
Mr. Korpi:	Ooh, I don't recall that.
AUSA Peters:	Mr. Korpi, do you remember attending a briefing in Washington D.C., in approximately October of 1990?
Mr. Korpi:	That's correct.
AUSA Peters:	And you remember telling Mr. Kennedy at that time, sir, that you

had helped him when he was in trouble and now you wanted help now that you were in trouble?

Mr. Korpi: No, I don't recall--I recall being there, but I don't recall that that was the reason for being there.

AUSA Peters: And do you recall, sir, a gentleman named John Romaker who was an attorney from San Diego?

Mr. Korpi: John Romaker. In that October 15 meeting or October --

AUSA Peters: Of 1990, sir, that's right?

Mr. Korpi: Do I recall John Romaker?

AUSA Peters: Yes, an attorney from San Diego who represented Mr. Kennedy's interests.

Mr. Korpi: I remember another attorney. I forgot his name. You may have it. Maybe you can help me out. There was another attorney that I met there, yeah. I forgot his name.

AUSA Peters: Well, do you think it might refresh your recollection, sir, to see a payment in the amount of $5,000 that bears the memorandum on the check "R. Korpi"?

Mr. Korpi: $5,000? What was it for?

AUSA Peters: I'm asking the questions.

Mr. Korpi: I can't remember. I don't remember it. I'm sorry. I don't remember it. I just don't remember it. He may have given me $5,000. I don't know. I

don't know. I just truly don't remember it, if he did.

AUSA Peter: Mr. Korpi, my question is whether it might refresh your recollection to see the check I've asked you about.

Mr. Korpi: Oh, I suppose if I saw the check, but--look at my signature, see if its on there.

* * * * *

AUSA Peters: Mr. Korpi, I show you a copy of what's been marked for use as plaintiffs Exhibit 1214. Do you have that before you?

Mr. Korpi: I have a check from a Brown McDonald International Holloway Company, San Diego, First California Bank, made out to John--oh, client trust fund. Okay.

AUSA Peters: Mr. Korpi--

Mr. Lane: Judge, I'm objecting at this point. I think I have to approach at this point. May we?

The Court: Well, the question wasn't responsive in the first place. What is the rule upon which you rely, Mr. Lane?

Mr. Lane: On previous rulings of this court as to what we can get into and what we can't get into, your Honor. I mean the source of various things.

The Court: Well, yeah, I think maybe you better come on up.

[At the bench:]

The Court: I think I understand the objection. What's the source of these funds, Mr. Peters?

AUSA Peters: I don't know for sure that the source of the funds, and I don't intend to ask about them; but I intend to ask whether this witness received a $5,000 payment and terminate.

The Court: From whom?

AUSA Peters: From a law firm Brown and McDonald.

Mr. Lane: Which is all part of the [Kuwait case] indictment.

The Court: I'm going to sustain the objection to that extent.

AUSA Peters: All I'm asking, your Honor, is that the check has a memo on it that says, "R Korpi." If this refreshes his recollection about the payment, that's all the further I want to go.

The Court: To that extent--Mr. Lane, under 612, the writing will not come in evidence; and if it refreshes--you know, pin him down. If it refreshes his recollection, fine. If it does not, fine. But in terms of the document, it doesn't come in. It just refreshes his recollection.

AUSA Peters: Right.

Mr. Lane: Judge, the other thing we should clear up at a bench conference is Mr. Peters is leaving a hanging implication here that people only got two payments from the bankruptcy;

and the big question then becomes, well, why was that. And this witness is prepared to give an answer as to why only two payments.

The Court: No. I'm not getting into that. Not at all. I mean it's--the--we've had--we've had substantial testimony consistently that creditors got one or two payments of 100, $200 and that's total. That's wholly consistent. That's cumulative. That doesn't go to anything, and I'm not going to go further than that. Now get through this process under 612 and let's get on with this witness.

AUSA Peters: The offer is only under 607, and I understand the court's ruling. And that's all I intend to do. Thank you, your Honor.

The Court: All right.

[In open court:]

The Court: Mr. Korpi, I'm going to tell you once again, sir, please just listen to the lawyer's question and answer that question and nothing more.

AUSA Peters: Mr. Korpi, does the memorandum "R. Korpi" refresh your recollection as to whether you received a payment for $5,000?

Mr. Korpi: No, it doesn't

(WMC Case Trial Transcript at 4321-4325, Pet'r Ex. 52.) Shortly thereafter, the following colloquy took place outside the presence of the jury:

Mr. Rapson: Your Honor, if it please the Court, during the examination of -- or cross-examination of Mr. Korpi, the government made reference to Government Exhibit 1008, and I didn't have that exhibit at that time, and have only looked at it since then.

But the thrust I thought of what they were suggesting was that Government Exhibit 1008 indicated that there had been a payment from Mr. Kennedy to Mr. Korpi of $5,000. Now maybe that's not what the government intended, but this document itself is a check from Brown and McDonald, International Monetary, to another party on the surface at least unrelated to Mr. Korpi, somebody called John Rambler, attorney/client trust account, $5,000.

The Court: I am sorry to interrupt, Mr. Rapson. I think you mean 1214.

Mr. Rapson: You are correct, your Honor. When I said 1008, I was looking at the check number, but it's Plaintiff Exhibit 1214, but I thought what the government was suggesting in some way it amounted to a $5,000 payment from Mr. Kennedy to Mr. Korpi, and at least on the face of it it appears to be something quite different.

I suspect that there is very good explanation that the government has, but in the absence of an explanation,

I wonder if this jury might not be misled at this point as to what this document suggests.

The Court: I thought we covered that at the bench conference. The document was merely proffered by the government to see if it refreshed the witness' recollection under Rule 612 as to whether he had received a $5,000 payment from Mr. Kennedy.

The government, if my recollection is correct, had asked if Mr. Korpi had, and he testified that he had no recollection of it. After viewing the exhibit he testified that it did not refresh his recollection. And that was the end of the matter.

Mr. Chesler.

Mr. Chesler: It if please the court, your Honor, I am also concerned about what transpired, and for this reason if I can articulate it to you. The question was first prefaced did you receive a $5,000 payment. The suggestion being that that's the reason he is testifying for Mr. Kennedy, because he got more than the rest of the creditors got, notwithstanding the fact that he was the chairman of the committee representing the creditors.

In order for that question to be asked, there must be a good faith belief that that is indeed what transpired. The exhibit, not intending to be offered apparently, is then proffered to refresh recollection, the person says

it didn't refresh my recollection, but the suggestion is there to the jury that this man was bought off in some way with $5,000. That's why he is here today and this is a put-up job.

I think that that can be cured in some way. I don't think it's irreparable. I don't think it was offered improperly. I need to hear that, too. But, nevertheless, the innuendo is as damning, and I think it needs some repair for that reason.

AUSA Peters: It needs no repair. The allegations in the companion indictment which we carefully stayed away from are that on the date of the check, number 1008, October 23rd, 1990, Mr. Kennedy, as the Court has heard in the Court conducted proceedings, that his check for sudden bankruptcy was in fact dead in the Southern District of California. It is alleged in the companion case that this account, the account entitled Brown McDonald, IMF, International Monetary, was an account that Defendant Kennedy controlled on that date. The question was asked in good faith. I object to any curative instruction.

The Court: Well I am satisfied that the question was asked in good faith. Beyond that the jury has been told and will be told again--I think the jury has been told just recently--that the questions of counsel are not evidence, That's

why I make the instruction at the outset of the case.

AUSA Peters: Mr. Rapson's record as carefully crafted is also incomplete because the memorandum--and I asked Mr. Korpi about this specifically under terms of 612 over--says re: Korpi. I want the record to show that.

Mr. Rapson: I wasn't suggesting there was some something wrong. I was just asking for an explanation for the government, and they may have all kinds of evidence that this in fact is a direct payment of $5,000 from Mr. Kennedy to Mr. Korpi.

I was just suggesting on the surface there is nothing to suggest that--and apparently government counsel is satisfied that there is enough basis them to ask the question. I guess I am satisfied I agree with Mr. Chesler, that this jury, I think is walking away thinking that that document is really evidence of $5,000 payment.

The Court: The document was not admitted.

Mr. Rapson: I understand.

The Court: It's not an exhibit in the case. It's not evidence in the case. I have also told the jury unless the exhibit is admitted, it's not evidence in the case. That's why I tell them these things. Mr. Sutton.

Mr. Sutton: Am I mistaken or wasn't there some--an inquiry immediately before the

check, something to this effect: Didn't you meet with Mr. Kennedy and tell him that you --that you were there when he needed you, and now I need you, Bill, and that's why the $5,000.

AUSA Peters: Most certainly was.

The Court: That was the question.

Mr. Sutton: Okay.

The Court: Well he had no recollection of any payment. He had--frankly my recollection of the testimony was that he had no recollection that that was expressed by Mr. Kennedy at that time.

Mr. Sutton: Well is the government intending to introduce that?

The Court: No, it's not evidence in the case. I didn't let them get it in. It's just not evidence in the case.

Mr. Sutton: Okay.

The Court: Counsel's statements are not evidence in the case or questions I mean. I have told the jury that they can't infer from a question what the answer might be. I have told them that. Okay.

(WMC Case Trial Transcript at 4405-4409, Pet'r Ex. 52.)

It also bears noting that Mr. Danley testified as follows during the grand jury proceeding:

AUSA Peters: I see. I want to direct your attention, please, to about October 16, 1990. Did you have conversations on that

day with a creditor of Western Monetary Consultants known as Robert Korpi?

Mr. Danley: Yes, I did.

AUSA Peters: Do you recall his name being spelled K-o-r-p-i?

Mr. Danley: That's correct.

AUSA Peters: And he had been at this client briefing; is that right?

Mr. Danley: The day before, yes.

AUSA Peters: And it's my understanding that Mr. Korpi excuse me, Korpi--had fallen upon some hard times himself, is that right?

Mr. Danley: Yes.

AUSA Peters: And various of his businesses were in Chapter 7 bankruptcy; is that right?

Mr. Danley: He had just converted to a Chapter 7 bankruptcy.

AUSA Peters: And Mr. Korpi was looking for Mr. Kennedy to pay him some money to help him through this time; is that right?

Mr. Danley: Yes.

AUSA Peters: So there was no doubt in those conversations between Mr. Korpi, the creditor, and Mr. Kennedy that the money was Kuwaiti money; is that right?

Mr. Danley: No doubt, yes.

(Grand Jury Transcript of 11/10/92, Pet'r Ex. 39). Mr. Kennedy avers that this court's failure to give a curative instruction or prevent AUSA Peters from asking questions regarding the check during the WMC trial constitutes a violation of the Due Process Clause of the Fifth Amendment of the United States Constitution.

c. Reference to Petitioner's Religious Beliefs and Activities

Mr. Kennedy also claims that the prosecution unfairly emphasized his religious beliefs during the grand jury process and the WMC trial. During the WMC trial, Joanne Monath, a former WMC employee, testified that WMC targeted people with conservative political and religious beliefs as likely to be interested in precious metal investments. (Pet'r Opening Brf. at 82 (citing WMC Trial Transcript at I 100, 113 5, Pet'r Ex. 52),) Thereafter, other witnesses described how Mr. Kennedy carried a Bible and concluded some meetings with prayer. (Pet'r Opening Brf. at 82 (citing WMC Trial Transcript at 1302)). AUSA Peters queried an expert witness regarding the utility of injecting religion into WMC seminars and discussed Mr. Kennedy's use of religion during closing argument. (Pet'r Opening Brf. at 82 (citing WMC Trial Transcript at 4740, 128).) Mr. Kennedy contends that the elicitation of that testimony and comments during closing argument violates the Free Exercise Clause of the First Amendment and the Due Process Clause of the Fifth Amendment of the United States Constitution.

d. Ineffective Assistance of Counsel

Lastly, Mr. Kennedy contends that his trial counsel, Mr. Lane, rendered ineffective assistance of counsel during the WMC trial. Mr. Kennedy argues that, if the prosecution did not violate *Brady* by failing to disclose exculpatory information, then Mr. Lane rendered ineffective assistance of counsel by failing to move for the suppression of information derived from Mr. Danley.

III. PROCEDURAL BAR

The government argues that, with the exception of his ineffective assistance of counsel claim? Mr. Kennedy's claims are procedurally barred because he failed to raise those arguments on direct appeal, I agree, in part. For the reasons set forth below, only two claims are not procedurally barred: ineffective assistance of counsel and intrusion into the attorney-client relationship.

a. Procedural Bar Standards

Section 2255 states, in relevant part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> Unless the motion and the files and records of the cast conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that . . . the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

> A court may entertain and determine such motion without requiring the production of the prisoner at the hearing. An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

28 U.SC, § 2255 (1997). Section 2255 does not afford petitioners a means of testing the legality of matters that should have been raised on direct appeal. *United States v Cook*, 997 F.2d 1312, 1320 (10th Cir. 1993); *Daniels v. United States*, 26 F.3d 706, 711 (7th Cir. 1994) (A motion brought pursuant to § 2255 "is neither a recapitulation of nor a substitute for a direct appeal.") A petitioner's failure to present an issue on direct appeal bars him from raising the issue in his 2255 motion unless he can show cause excusing his procedural default and "actual prejudice" resulting from the errors of which he complains, or that a fundamental miscarriage of justice will occur if his claim is not addressed. *Frady*, 456 U.S. at 167-169, *Cook*, 997 F.2d at 1320.

To show "cause" excusing procedural default, the petitioner must demonstrate that an external objective factor impeded his ability to directly appeal. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). For example, "showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials made compliance impracticable, would constitute cause under this standard." *Id.* (internal quotation and citations omitted). Ineffective assistance of counsel in violation of the Sixth Amendment may constitute an excusable "cause" of procedural default. *Id.* Further, and as noted by the Court of Appeals in *Kennedy II*, a petitioner may wait to raise his ineffective assistance of counsel claim in a § 2255 motion if the petitioner's claim requires examination of facts outside trial record. *United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995). Lastly, the issuance of an intervening decision by the Supreme Court which applies retroactively and changes the interpretation of the statute under which the

petitioner was convicted, may establish "cause." *Abreu v. United States*, 911 F.Supp. 203, 207 (E.D.Va. 1996). When assessing whether a party has established cause, the court may, examine only that party's proffered reasons for not appealing and may not speculate about other possible explanations. *Williams v. United States*, 805 F.2d 1301, 1304 (7th Cir. 1996). To show "actual prejudice" excusing procedural default, the, petitioner must demonstrate that he was denied "fundamental fairness," *Murray*, 477 U.S. at 494, or that, but for the error, he "might not have been convicted." *Reed v. Ross*, 468 U.S. 1, 12 (1984).

The "miscarriage of justice" exception to the cause and prejudice test is narrow. Only "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, [may] a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray*, 477 U.S. at 496. The fundamental miscarriage of justice exception is reserved solely for those with a "colorable showing of factual innocence." *Kuhlmann v. Wilson*, 477 U.S, 436, 454 (1986). In deciding whether this narrow exception applies in a particular case, the court is guided by the "prototypical example" in which "the State has convicted the wrong person of the crime." *Sawyer v. Whitley*, 505 U.S. 333, 340-341 (1992). Application of this exception is limited to the "extraordinary case." *Schlup v. Delo*, 513 U.S. 298, 321 & n. 36 (1995).

Mr. Kennedy first contends that his claims are not procedurally barred because the alleged collective errors occurring before and during his trial constitute a fundamental miscarriage of justice under *Frady, supra*. Mr. Kennedy combines undisputed evidence, disputed evidence, reasonable inferences, unreasonable inferences, and conjecture in a complex argument in support of his innocence. Essentially, he contends that the prosecution's alleged intrusion into his attorney-client relationship, failure to disclose exculpatory information, misrepresentations, interjection of religion

during trial, cross-examination of Mr. Korpi, imposition of secrecy on Mr. Romaker, and informal assurance of prosecutorial immunity for Mr. Danley, all combine to demonstrate his factual innocence. I am unpersuaded,

As noted above, the "miscarriage of justice" exception to the cause and prejudice test is extremely narrow. Assuming the truth of Mr. Kennedy's contentions, he arguably was deprived of Fifth and Sixth Amendment rights. Yet such contentions, even assuming their truth, do not demonstrate Mr. Kennedy's factual innocence. He provides no such evidence bearing on the elements of the crimes of racketeering, mail fraud, or money laundering.

Mr. Kennedy compares his case to *Medina v. Barnes*. 71 F.3d 363 (10th Cir. 1995). In *Medina*, the Court of Appeals found the petitioner satisfied the miscarriage of justice standard. Noting that the government's case was not strong to begin with, the Court of Appeals determined that the petitioner's trial counsel failed to investigate the testimony of the prosecution's only eyewitness to the crime of murder. During trial, the eyewitness lied about several material issues, including his extensive criminal background his prior dealings and contacts with the victim, and how soon he called the police after the shooting. *Medina* at 371, The allegations left the Court of Appeals with the "distinct impression" of the petitioner's innocence. *Medina* at 371. Indeed, the Court of Appeals suggested that the eyewitness may have committed the murder. Id

Mr. Kennedy's case clearly does not rise to the level of *Medina*, The WMC trial lasted approximately seven weeks and, unlike the situation presented in *Medina*, numerous prosecution witnesses testified against Mr. Kennedy, some of whom were co-conspirators who worked for WMC. Further, although Mr. Kennedy was the only defendant convicted in the WMC case, substantial evidence pointed to him as the orchestrator of WMC affairs. Thus, the acquittal of his co-defendants does not, by itself, demonstrate that the government's case against Mr. Kennedy was weak. Moreover,

and unlike the petitioner in *Medina*, Mr. Kennedy fails to present in his petition any evidence showing his factual innocence. After reading *Medina*, it is understandable why the Court of Appeals was left with the impression that the wrong man may have been convicted. upon review of Mr. Kennedy's allegations, and having heard the evidence at his trial, I am left with no impression that he is factually innocent, I find, therefore, that this is not the extraordinary case" that fits into the narrow exception to the cause plus prejudice test. I turn, then, to Mr. Kennedy's remaining defenses to application of the procedural bar.

1. "Prosecutorial Misconduct

As described above, Mr. Kennedy categorizes five different claims as "prosecutorial misconduct." Despite his argument that the same analysis applies to each claim, whether those five claims are procedurally barred is a question best resolved on a claim-by-claim basis. *Cf Galloway*, 56 F.3d at 1241 (describing ineffective assistance of counsel claim as "unitary" for purposes of collateral review), Accordingly, I discuss each of his five "prosecutorial misconduct" claims separately regarding the procedural bar issue.

i. "Prosecutorial Misconduct:" Intrusion into the Petitioner's Attorney-Client Relationship

Mr. Kennedy contends that his failure to argue, on direct appeal, unlawful intrusion into his attorney-client relationship should be excused for the reasons enunciated by the court of Appeals in *Kennedy II, supra*. In *Kennedy II*, the Court of Appeals instructed:

> Based on this court's reasoning in *United States v. Galloway*, we hold that Kennedy's ineffectiveness claim should be brought on collateral review. 56 F.3d 1239, 1240 (10th Cir. 1995) (en banc) ("Ineffectiveness claims brought on direct appeal are presumptively dismissible, and virtually all will be dismissed") While we noted in

> *Galloway* that "in rare instances an ineffectiveness of counsel claim may need no further development prior to review on direct appeal," *id.*, this is not one of those exceptional cases. The bulk of Kennedy's arguments concerning his counsel's performance require precisely the type of factual determinations contemplated by *Galloway* as beyond the scope of the record on direct review--*e.g.*, assessments of what counsel did and did not do to prepare. for trial, what he would or would not have found had he spent more time on various tasks, and whether the "mishandled" expert examination could be attributed to a fickle witness or an intentional trial strategy. Because any aspects of Kennedy's argument that already may be developed in the record are inextricably intertwined with other aspects of his argument, it is far more efficient to address the ineffectiveness claim in its entirety with the benefit of a full record before a district court on collateral review. *See id.* at 1241 ("[A]n ineffectiveness claim may be viewed as unitary, regardless of the number of separate reasons advanced in support of the claim. A unitary claim by definition cannot easily be split into two proceedings on any logical basis."). Accordingly, we dismiss Kennedy's claim of ineffective assistance of counsel without prejudice to Kennedy's right to raise it again in a collateral proceeding.

Kennedy II, 64 F.3d at 1474-1475. *Galloway*, in turn, cites *Beaulieu v. United States*, 930 F.2d 905 (10th Cir. 1991). *Galloway*, 56 F.3d at 1240-1241. In *Beaulieu*, the Court of Appeals first held that ineffective assistance of counsel claims must normally be raised on collateral review. *Beaulieu* at 807. The Court of Appeals also noted that "'collateral review will frequently be the only means through which an accused can effectuate the right to counsel . . .'" *Id.* (*quoting Kimmelman v. Morrison*, 477 U.S. 365 (1986)).

Although the Court of Appeals has never applied this rationale to a claim of intrusion into the attorney-client relationship, reason dictates that the same analysis should apply to both claims, Each invokes the petitioner's Sixth Amendment right to effective assistance of trial counsel. Further, each claim usually requires consideration of matters not contained in the record on direct appeal. A claim of ineffective assistance of counsel involves assessments of how counsel prepared for trial, what counsel would or would not have found had he or she spent more time on various tasks, and whether counsel's decisions could be attributed to intentional trial strategy. *Kennedy II, supra.* Likewise, an intrusion claim requires assessments of whether an intrusion occurred, the prosecutor's state of mind, the extent of the intrusion, and the extent of prejudice incurred by the defendant. Because an intrusion claim requires precisely the type of determinations contemplated by *Galloway* and *Beaulieu*, it should normally be raised on collateral review where, as here, a substantial amount of evidence identified by the petitioner is not contained in the trial record. Accordingly, Mr. Kennedy's claim for intrusion of his attorney-client relationship is not procedurally barred and I need not consider his arguments in support of cause and prejudice regarding his claim. *See also United States v. Lee*, 1998 WL 45005, *3 (D.Kan. 1998) (unpublished opinion) (extending rationale of *Galloway* to claim of involuntary plea).

ii. "Prosecutorial Misconduct:" Discovery Violations

As to his claim that the prosecutor failed to disclose to Mr. Kennedy exculpatory evidence, as required by *Brady v. Maryland*, 373 U.S. 83 (1963). Mr. Kennedy cites four types of information not disclosed regarding Mr. Danley or Mr. Romaker that the prosecution allegedly failed to disclose before the WMC trial:

(a) reports of prosecution intetviews of Mr. Danley;

(b) report of a prosecution interview of Mr. Romaker conducted on September 27, 1991;

(c) the loss of ten pages of notes compiled by Mr. Danley during October 1990; and

(d) the fact of Mr. Danley's decision to conduct legal research during October 1990 and before he worked directly for Mr. Kennedy, which research inquired whether the attorney-client privilege applied to Mr. Danley's relationship with Mr. Kennedy.

Mr. Kennedy contends that this information was not disclosed until the Kuwait trial commenced during March 1995, at least one month after the Court of Appeals heard oral argument on his direct appeal of the WMC case. The government has not demonstrated otherwise. Accordingly, Mr. Kennedy establishes cause for failure to allege *Brady* violations on direct appeal.

Although Mr. Kennedy establishes cause with respect to such information he fails to establish prejudice. Noting that "[t]here appears to be little or no difference in the operation of the "materiality" (*Brady*) and "prejudice" (*Frady*) tests," the Tenth Circuit Court of Appeals has held that the "materiality" inquiry provides the proper test for analyzing whether a petitioner's *Brady* claim is procedurally barred. *United States v. Hernandez*, 94 F.3d 606, 609-610 (10th Cir, 1996); accord *United States v. Buchanan*, 991 F.2d 1436, 1440-1445 (10th Cir. 1989).

The essence of the *Brady* rule is that nondisclosure of material, exculpatory evidence violates a defendant's due process right to a fair trial. *See, e. g., United States v. Bagley*, 473 U. S. 667, 675 (1985) ("The *Brady* rule is based on the requirement of due process." (Blackmun., J.); *United States v. Robinson*, 39 F.3d 1115, 1118 (10th Cir. 1994) (due process mandates disclosure); *United States v. Fleming*, 19 F.3d 1325, 1330 (10th Cir. 1994) (same). I am cognizant that "[i]f the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of

the prosecutor." *United States v. Agurs*, 427 U.S. 97, 110 (1976). *Accord Smith v. Phillips*, 455 U.S. 209, 219 (1982) ("[T]he touchstone of due process analysis . . . is the fairness of the trial, not the culpability of the prosecutor."), As a result, it is irrelevant for the materiality analysis "'whether the nondisclosure was a result of negligence or design.'" *Buchanan*, 891 F.2d at 1442 (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972)); *see also Brady*, 373 U.S. at 97 (noting that suppression of material exculpatory evidence violates due process "irrespective of the good faith or bad faith of the prosecution"), *United States v. Pedraza*, 27 F.3d 1515, 1527 (10th Cir. 1994) (same).

The United States Constitution, as interpreted by *Brady*, does not require the prosecution to divulge every possible shred of information that could conceivably benefit the defendant. *Moore v. Illinois*, 408 U.S. 786, 793 (1972) ("We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case."); *United States v. Comosona*, 848 F.2d 1110, 1115 (10th Cir. 1998) ("The Government has no obligation to disclose possible theories of the defense to a defendant."). Due process only requires the disclosure of material, exculpatory evidence which, "if suppressed, would deprive the defendant of a fair trial." *Bagley*, 473 U.S. at 675. Therefore, in order to establish a *Brady* violation, Mr. Kennedy bears the burden of establishing that, (1) the prosecution suppressed evidence; (2) the evidence was favorable to the accused; and (3) the evidence was material. *United States v. Hughes*, 33 F.3d 1249, 1251 (10th Cir. 1994). It is the third element that I must analyze in the context of determining whether Mr. Kennedy's *Brady* claim is procedurally barred. I assume, therefore, for the purposes of this specific analysis, that the prosecution suppressed the information in question and that such information was favorable to Mr. Kennedy.

The third element requires proof that the evidence was "material either to guilt or to punishment." *Brady*, 373 U.S. at

97. "A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." *Agurs*, 427 U.S. at 104. The Supreme Court first addressed the materiality question in *Agurs*, establishing three different standards of materiality dependent upon "the specificity of the defendant's request and the conduct of the prosecutor." *Buchanan*, 891 F.2d at 1441. The *Agurs* framework, however, was rigid and difficult to apply, leading five members of the Supreme Court, through two separate opinions, to adopt a single standard. *Bagley*, 473 U.S. at 692 (opinion of Blackmun, J.); Id. at 685 (opinion of White, J.); *see also Bowen v. Maynard*, 799 F.2d 593, 603 (10th Cir. 1986) (discussing the three standards of materiality under *Agurs* and noting that after *Bagley*, courts are to apply "'a single test . . . to all instances of nondisclosure, including specific request, general request and no request cases'). Under this standard, "[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682; *accord Fero v. Kerby* 39 F.3d 1462, 1472 (10th Cir. 1994).

> Under this more flexible, sliding scale approach to assessing the materiality *vel non* of the evidence in question, the specificity of the request is inversely related to the prosecution's disclosure obligation. As the specificity of the defendant's request increases, a lesser showing of materiality will suffice to establish a violation. Conversely, as the defendant's request becomes more general or even nonexistent, a greater showing of materiality is required to establish a *Brady* violation.
>
> In making the materiality determination, "we view the suppressed evidence's significance in relation to the record as a whole," *Hughes*, 33 F.3d

> at 1252 (citing *United States v. Wolf*, 939 F.2d 1387, 1391 (10th Cir.), *cert. denied*, 489 U.S. 923 (1988)), keeping in mind that "[w]hat might be considered insignificant evidence in a strong case might suffice to disturb an already questionable verdict," [*United States*] *v. Robinson*, 39 F.3d at 1119 (citing *Agurs*, 427 U.S. at 113). We are also to consider "any adverse effect that the prosecutor's failure to respond might have had on the presentation or presentation of the defendant's case...in light of the totality of the circumstances." *Bagley*, 473 U.S. at 683. We reiterate the question of "[w]hether the government was required to disclose certain evidence under *Brady* is a mixed question of law and fact which we review *de novo*."

Smith v. Secretary of New Mexico Dept. of Corrections, 50 F.3d 801, 827 (10th Cir. 1995). Applying these principles to the facts of the present case, I conclude that the allegedly undisclosed information is immaterial.

Mr. Kennedy contends that the notes compiled by Mr. Danley and the prosecution team are material to his defense because the disclosure of such information could have enabled Mr. Lane to prevent the impeachment of Mr. Korpi. As to the allegedly lost or destroyed notes of Mr. Danley, Mr. Kennedy's assertion that Mr. Danley's notes would contain no mention of a payment to Mr. Korpi in October 1990 is pure conjecture. "The mere possibility that evidence is exculpatory does not satisfy the constitutional materiality standard." *United States v. Fleming*, 19 F.3 d 1325, 1331 (10th Cir. 1994).

As for the notes of meetings compiled by the prosecution that were not lost or destroyed, Mr. Kennedy has not shown how they could have been useful to Mr. Lane. As evidenced by the above-quoted portions of the WMC trial, AUSA Peters' attempt to impeach Mr. Korpi was unsuccessful. Mr. Korpi denied receiving any preferential payment from Mr. Kennedy, which testimony is uncontroverted. Further, a copy

of the check was never admitted as evidence. Although Mr. Kennedy contends that the government's disclosure of its loss of Mr. Danley's notes would have enabled Mr. Lane to rehabilitate Mr. Korpi, Mr. Korpi required no rehabilitation. The proof sought by AUSA Peters was absent when Mr. Korpi denied receiving a preferential payment, and I permitted AUSA Peters to go no further in his impeachment attempt. Moreover, this allegedly undisclosed evidence is insignificant considering the record as a whole.

Even if the notes allegedly compiled by Mr. Danley and the prosecution were disclosed to Mr. Lane, and even if such notes would not have contained any reference to a preferential payment for Mr. Korpi, Mr. Lane's use of such notes during re-direct would have only emphasized the point AUSA Peter failed to make. Further, had Mr. Lane called Mr. Danley as a witnessed to testify that no payment was made to Mr. Korpi, AUSA Peters could have impeached Mr. Danley with his grand jury testimony, also quoted above. Accordingly, the usefulness of such information to the defense is *de minimis* at best.

As for the prosecution's alleged failure to disclose the fact of Mr. Danley's decision to conduct legal research inquiring whether the attorney-client privilege applied to Mr. Danley's relationship with Mr. Kennedy (type(d)), I question whether this alleged fact constitutes information subject to disclosure. In any case, I fail to see the value of such information if known by Mr. Lane. Mr. lane could not have used such information to impeach Mr. Danley, because Mr. Danley never testified during the WMC trial. Further, even if the disclosure of such information would have led to the suppression of the check used by AUSA Peters during his attempt to impeach Mr. Korpi, I find that AUSA Peters' cross-examination was ineffective. Lastly, the only piece of evidence that Mr. Kennedy can point to as emanating from the alleged intrusion is the check used by AUSA Peters, which check was not admitted into evidence. Applying the *Bagley* standard to my close examination of the record, I

conclude that there exists no reasonable probability that disclosure of the cited evidence would have produced a different verdict. Because the allegedly undisclosed information is immaterial, Mr. Kennedy's *Brady* claim is procedurally barred.

iii. "Prosecutorial Misconduct:" Misrepresentation of Material Facts

Mr. Kennedy avers that AUSA Peters misrepresented certain facts on two occasions. First, Mr. Kennedy maintains that AUSA Peters told Mr. Lane that Mr. Danley had nothing to do with the WMC case. Second, Mr. Kennedy contends that AUSA Peters lied in open court during the WMC trial about his knowledge of the source money purportedly paid by Mr. Kennedy as a preferential payment to Mr. Korpi, chairman of a creditors' committee in the WMC bankruptcy case. For all practical purposes, the non-*Brady* aspects of these allegations are subsumed within Mr. Kennedy's intrusion claim. Mr. Kennedy contends that AUSA Peters made both misrepresentations to conceal his intrusion of Mr. Kennedy's attorney-client relationship. Accordingly, I will treat these allegations as subsumed within Mr. Kennedy's intrusion claim.

iv. "Prosecutorial Misconduct:" Informal Offer of Immunity to Mr. Danley and Imposition of Obligation of Secrecy on Mr. Romaker

Mr. Kennedy fails to show cause and prejudice for his failure to allege these claims on direct appeal. Even if he could demonstrate cause, he shows no prejudice. In *Giglio, supra*, the United States Supreme Court held that, when the credibility of a government witness is an important issue in a case, "evidence of any understanding or agreement as to a future prosecution is relevant to his credibility and the jury is entitled to know of it." *Giglio*, 450 U.S. at 154-155. Consequently, failure to disclose a promise made to a key government witness is material and violates the Due Process Clause of the Fifth Amendment. Because Mr. Danley did not

testify at the WMC trial, the prosecution did not violate *Giglio* even if a grant of informal immunity existed.

Mr. Kennedy's allegation that the prosecution imposed silence on Mr. Romaker also lacks merit. First, the record fails to support Mr. Kennedy's allegation, premised on a memorandum that states, in relevant part:

> On the above date AUSA Peters, Inspector Carr, and I telephoned Mr. Romaker.
>
> * * *
>
> [Mr. Romaker] advised that he is considering calling Mr. Lampson and letting him know of this phone call. However he does not know if at this time Mr. Lampson represents the aforementioned corporations. However he feels that he might be ethically obliged to let someone know. When asked if we agreed not to examine Mr. Hause regarding conversations with Mr. Romaker and the performance of accounting services for these three corporate entities would it be necessary for him to contact Mr. Lampson regarding the subpoenas. Mr. Romaker at that time place [sic] us on hold to do research regarding the California rules of professional contact [sic].
>
> After researching the matter Mr. Romaker returned to the phone and advised that he had no problem regarding the questioning as long as it would not touch on those matters. However he had a problem regarding any questions relating to the Coalition for America at Risk because he did some work for the Coalition for America at Risk and that time and there were some reservations relating to the Coalition for America at Risk and those three entities. Therefore Mr. Romaker asked that any discussion between himself and Mark Hause regarding the Coalition for America at Risk be

> added to the list of areas to be avoided to which AUSA Peters agreed.
>
> At this time AUSA Peters agreed to fax a letter of agreement to Mr. Romaker outlining what had just been discussed and discontinued the phone conversation.

(Memorandum of Tel. Conv. of 11/4/91 at 1, 3, Def's Ex. 18.) The memorandum discloses nothing more than a mutual agreement. AUSA Peters agreed to curtail the scope of his inquiry in exchange for Mr. Romaker's promise to refrain from contacting an attorney representing Mr. Kennedy's interests, The memorandum demonstrates no unlawful coercion. Mr. Romaker, after researching California rules of ethical conduct, simply decided that the situation did not require him to contact Mr. Kennedy's attorney. Accordingly, Mr. Kennedy's allegation that the prosecution silenced Mr. Romaker lacks substantive merit.

Even if the prosecution had imposed secrecy on Mr. Romaker by coercion or otherwise, Mr. Kennedy fails to refer to any valid legal authority as prohibiting the imposition of secrecy on a grand jury witness. In support of his claim Mr. Kennedy cites *United States v. Kilpatrick*, 594 F.Supp. 1324, 1335-1336 (D.Colo. 1984). That decision, however, was reversed on appeal. *See United States v. Kilpatrick*; 821 F.2d 1456 (10th Cir, 1987), *aff'd sub nom. Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988). In *Bank of Nova Scotia*, the United States Supreme Court reviewed the district court's finding that the imposition of secrecy on a grand jury witness violates Federal Rule of Criminal Procedure 6. Neither the district court nor the Supreme Court suggested such conduct violates any constitutional provision or other rule of law. *Bank of Nova Scotia* at 262. In *Hill v. United States*, 368 U.S. 424, 428 (1962), the Supreme Court held that, in the absence of any indication that the defendant was prejudiced by the asserted error, § 2255 collateral relief is not available for the failure to comply with the formal requirements of a rule of criminal procedure. *Accord United States v. Timmerck*, 441

U.S. 780, 793 (1979) (violation of Fed.R.Crim.P. 11). Mr. Kennedy has shown no prejudice caused by this conduct. Nor does he identify a constitutional or jurisdictional basis for this claim and, therefore, this claim may not be brought on collateral review.

2. **Commission of Error by the District Court in Allowing the Prosecutor to Read the Contents of a Prejudicial Exhibit in the Jury's Presence**

Unlike his intrusion claim, Mr. Kennedy should have raised on direct appeal his allegation that this court erred in allowing the prosecutor to read the contents of a prejudicial exhibit in the jury's presence. As indicated by the excerpts from the WMC trial quoted above on page 13-17 [13a-22a] of this order, AUSA Peters attacked the credibility of Mr. Korpi on cross-examination by confronting him with a check in the amount of $5,000.00 made payable to Mr. Romaker and bearing the notation "R. Korpi," a check that was drafted against a trust account established by Brown & McDonnell in San Diego. Mr. Kennedy's trial counsel objected to AUSA Peters' cross-examination. (WMC Trial Transcript at 4321-4323, Pet'r Ex. 52.) Counsel for Mr. Kennedy's co-defendants requested a curative instruction after the cross-examination. (WMC Trial Transcript at 4405-4409.) The nature of counsels' legal arguments demonstrates that the alleged prejudice was well known to all at the time of trial. Further, this claim requires no expansion of the trial record and, therefore, should have been raised a direct appeal. This claim is procedurally barred for failure to show cause.

To the extent this claim is related to Mr. Kennedy's intrusion claim, however, it may survive the government's procedural objections. As part of his intrusion claim, Mr. Kennedy aver that AUSA Peters gained knowledge about the check and Mr. Korpi from Mr. Danley, in violation of Mr. Kennedy's attorney-client relationship. Further, Mr. Kennedy contends that such information should have been suppressed as "fruit of the poisonous tree." *See United States v. Kingston*,

971 F.2d 481, 491-492 & 492 n. 6 (10th Cir, 1992) (breach of attorney-client privilege bars prosecution from presenting tainted evidence at trial) (citing *United States v. Blue*, 384 U.S. 251, 255 (1966)). Thus, to the extent Mr. Kennedy contends that the evidence of the $5,000 check is derived from the alleged intrusion, that contention is not barred and remains viable, but only within the context of his intrusion claim.

3. **Reference to Petitioner's Religious Beliefs and Activities**

Mr. Kennedy's contention that the prosecution unfairly emphasized his religious beliefs during trial is procedurally barred. Mr. Kennedy does not argue cause and prejudice for failing to raise this issue. Lastly, this claim does not require expansion of the trial record for adjudication. Other criminal defendants have raised similar challenges on direct appeal. *See United States v. Myers*, 95 F.3d 1475 (10th Cir, 1996); *United States v. Sun Myung Moon*, 718 F.2d 1210 (2d Cir. 1983); *United States v. Peister*, 631 F.2d 658 (10th Cit. 1980).

Even if this claim were not procedurally barred, it lacks merit. The prosecution did not unfairly interject Mr. Kennedy's religious activities or beliefs into the WMC trial. Such evidence established only that WMC targeted individuals with conservative and political and religious beliefs. The evidence did not disparage Mr. Kennedy for having religious beliefs or his religious beliefs themselves. Rather, the evidence provided *modus operandi* context for the alleged crimes and, therefore, was admissible as *res gestae*. *See United States v. Kimball*. 73 F.3d 269, 272 (10th Cir. 1995) (approving the admission of res gestae evidence); *United States v. Masters*, 622 F.2d 83, 96 (4th Cir. 1900) (evidence is admissible when it provides the context for the crime, is necessary to a full presentation of the case, or is appropriate in order to complete the story of the crime on trial by proving its immediate context).

IV. NECESSITY OF AN EVIDENTIARY HEARING

"A prisoner who invokes § 2255 is not entitled to in evidentiary hearing as a matter of right" *David v. United States*, 134 F.3d 470, 477 (1st Cir. 1998). The district court need not hold an evidentiary hearing on the petitioner's claims if "the motion and files and records of the case conclusively show that the prisoner is entitled to no relief."'28 U.S.C. § 2255; *Galloway*, 56 F.3d at 1240 n. 1; *United States v. Lopez*, 100 F.3d 113. 119 (10th Cir. 1996). In determining whether the petitioner has satisfied his burden of establishing the need for an evidentiary hearing, I must accept as true petitioner's factual averments, except to the extent such averments are contradicted by the record. *United States v. McGill*, 11 F.3d 223, 225 (1st Cir, 1993); Rule 4 of the Rules Governing § 2255 Proceedings. I may disregard "conclusory allegations, self-interested characterizations, discredited inventions, or opprobrious epithets." *Id.*

a. Ineffective Assistance of Counsel

Mr. Kennedy contends that, if the prosecution failed to disclose exculpatory information required by *Brady*, then Mr. Lane rendered ineffective assistance by failing to move for the suppression of all evidence derived from Mr. Danley. In making this contingent claim, Mr. Kennedy assumes that Mr. Lane knew about information that would have compelled a reasonable attorney to move for suppression of the information derived from Mr. Danley. Although facially adequate, the petition, files, and record conclusively show that Mr. Kennedy is entitled to no relief and, therefore, resolution of his ineffective assistance of counsel claim does not require an evidentiary hearing.

To establish a claim for ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was constitutionally deficiency and (2) counsel's deficient performance was prejudicial, *Strickland v. Washington*, 466 U.S. at 687. Counsel's performance is deficient if the

representation "falls below an objective standard of reasonableness."' *Id.* at 690. Prejudice is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, "A reasonable probability is a probability sufficient to undermine confidence in the outcome," *Id.* "There is a strong presumption that counsel provided effective assistance, and a section 2255 defendant has the burden of proof to overcome that presumption." *United States v. Williams*, 948 F. Supp. 956, 960 (D.Kar. 1996) (citations omitted), *aff'd*, 118 F.3d 717 (10th Cir. 1997).

Assuming, *arguendo*, that Mr. Lane knew about the information identified by Mr. Kennedy in his *Brady* claim, his failure to move for suppression did not fall below an objective standard of reasonableness. Again, I emphasize that Mr. Danley never testified during the WMC trial. Further, the prosecution never used the notes of interview during trial. The only specific information that Mr. Kennedy identifies as deriving from Mr. Danley and used by the prosecution during trial is the check used by AUSA Peters during his failed attempt to impeach Mr. Korpi. The check failed to refresh Mr. Korpi's recollection, the check was never admitted into evidence, Mr. Korpi denied receiving preferential payments from Mr. Kennedy, and the jury was instructed that the questions of counsel do not constitute evidence. I cannot conclude, under such circumstances, that Mr. Lane made a constitutional error by failing to move for the suppression of evidence derived from Mr. Danley. Nor can I conclude that his failure to do so prejudiced Mr. Kennedy's defense. Because the petition, files, and records of the case conclusively show that Mr. Kennedy is entitled to no relief, no evidentiary hearing is warranted as to this claim.

b. Intrusion into Attorney-Client Relationship

The government contends that Mr. Kennedy's claim for intrusion of his attorney-client relationship does not constitute a violation of the United States Constitution. I need not address this contention. Assuming, *arguendo*, that Mr. Kennedy's allegations state violations of the Sixth Amendment right to counsel and the Due Process Clause of the Fifth Amendment his petition and the record of this case conclusively show that he is entitled to no relief, In *Schillinger II*, after finding an intentional and egregious intrusion into the, attorney-client relationship by the prosecution, the Court of Appeals discussed the remedies available for an intrusion that violates the United States Constitution:

> Recognizing "the necessity for preserving society's intent in the administration of criminal justice," the [United States Supreme] Court enunciated the following standard: "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies showed be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." (*United States v. Morrison*, 449 U.S. 361, 364 (1980).) The Court went on to describe how similar constitutional violations have generally been remedied:
>
> > [W]hen before trial but after the institution of adversary proceedings, the prosecution has improperly obtained incriminating information from the defendant in the absence of his counsel, the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence or to order a new trial if the evidence has been wrongfully admitted and the defendant convicted. . . .

> Our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial.

Id. at 365. The Court hold that in light of this precedent, absent some prejudicial effect on the defendant's proceeding, "there is no basis for imposing a remedy in that proceeding," *Id.* Because the federal agents received no information from Morrison, and because they otherwise failed to affect her relationship with her attorney, the Court held that there was no basis for imposing a remedy in that case, "much less" dismissal of her indictment.

Schillinger, II, 70 F.3d at 1142-1143. Thus, although "a prejudicial effect on the reliability of the trial process must be presumed" when ascertaining whether a Sixth Amendment violation has occurred, the extent of prejudice is taken into consideration when determining an appropriate remedy for the violation.

Here, accepting as true Mr. Kennedy's allegations except to the extent they are conclusory and contradicted by the record, he is not entitled to a new trial or dismissal of the indictment. As emphasized by the Supreme Court in *Morrison* and the Tenth Circuit Court of Appeals in *Schillinger II*, a new trial is appropriate only "if the evidence has been wrongfully admitted." Again, I return to the fact that Mr. Danley never testified during the WMC case. The notes compiled by Mr. Danley and the prosecution as a result of their meetings were never introduced as evidence. And again, the only evidence that Mr. Danley can identify as emanating from the alleged intrusion is the check used by AUSA Peters in his failed attempt to impeach Mr. Korpi. The check was never admitted into evidence. Under these circumstances, Mr. Kennedy is clearly not entitled to a new trial or dismissal of the indictment. The cases upon which Mr. Kennedy relies, in

which the appellate or district court dismissed the indictment or ordered a new trial, are inapposite. Because, the petition, files, and records of the case conclusively show that Mr. Kennedy is entitled to no relief on his intrusion claim, he has not satisfied his burden of showing the rated for an evidentiary hearing.

V. CONCLUSION

Mr. Kennedy combines undisputed evidence, disputed evidence, reasonable inferences, unreasonable inferences, and conjecture in a complex and cleverly drafted petition. When scrutinized, however, it is devoid of merit. First, most of his claims am procedurally barred. Although his claims for ineffective assistance of counsel and intrusion into his attorney-client relationship are not procedurally barred, the petition, files, and record of this case conclusively demonstrate that he is not entitled to § 2255 relief.

Accordingly, I ORDER that Defendant-Petitioner's motion to vacate, set aside, or correct his sentence pursuant to § 2255 is DENIED.

Dated: November 2, 1998 in Denver, Colorado.

BY THE COURT

/s/_____
LEWIS T. BABCOCK, JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMEIRCA,

Plaintiff - Appellee,

v. No. 98-1421

WILLIAM R. KENNEDY,

Defendant - Appellant

Before **TACHA, HOLLOWAY** and **BRORBY**, Circuit Judges.

ORDER

Filed November 17, 2000

William R. Kennedy's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /S/
K. Fabrizio, Deputy Clerk